TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 276.

WILLIAM H. EDWARDS, FORMERLY COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF NEW YORK, PETITIONER,

vs.

JOSEPH JERMAIN SLOCUM, HERBERT JERMAIN SLOCUM, STEPHEN L'HOMMEDIEU SLOCUM, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 7, 1924.
CERTIORARI AND RETURN FILED OCTOBER 24, 1924.

SUPREME COURT OF THE UNITED STATES.

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INDEX.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America To the Judges of the District Court of the United States for the Southern District of New York, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the District Court before you, or some of you, between Joseph Jermain Slocum, Herbert Jermain Slocum, Stephen L'Hommedieu Slocum, Robert W. de Forest, and Henry W. de Forest, as executors of the last will and testament of Margaret Olivia Sage, deceased, plaintiffs, and William H. Edwards, formerly collector of internal revenue for the second district of New York, defendant, a manifest error hath happened to the great damage of said defendant as is said and appears by his complaint, we being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the judges of the
2 United States Circuit Court of Appeals for the Second Circuit at the city of New York, together with this writ, so that you have the same at the said place before the judges aforesaid on the 30th day of August, 1922, that the record and proceedings aforesaid being inspected the said judges of the United States Circuit Court of Appeals for the Second Circuit may cause further to be done therein to correct that error, what of right and according to law and custom of the United States ought to be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, this 31st day of July in the year of our Lord one thousand nine hundred and twenty-two, and of the independence of the United States the one hundred forty-seventh.

ALEX. GILCHRIST, Jr.,
Clerk, District Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

AUGUSTUS N. HAND,
United States District Judge.

3 United States District Court for the Southern District of New York.

Summons.

JOSEPH JERMAIN SLOCUM, HERBERT JERMAIN SLOCUM, Stephen L'Hommedieu Slocum, Robert W. de Forest, and Henry W. de Forest, as executors of the last will and testament of Margaret Olivia Sage, deceased, plaintiffs,
against
WILLIAM H. EDWARDS, FORMERLY COLLECTOR OF internal revenue for the Second District of New York, defendant.

L 27 page 184.

To the above named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service. In case of your failure
4 to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Hon. Learned Hand, judge of the District Court of the United States for the Southern District of New York, at the city of New York, this 15th day of November, in the year one thousand nine hundred and twenty one.

[SEAL.]

ALEX. GILCHRIST, JR.,
Clerk.

DE FOREST BROTHERS,
Plaintiffs' Attorneys,

Office and post office address, 30 Broad Street, Borough of Manhattan, New York City.

5 United States District Court, Southern District of New York.

Notice of appearance and demand.

[Title omitted.]

You will please take notice that I am retained by, and appear as attorney for, the defendant in this action, and demand service of all papers in this action upon me, at my office in the United States Court and Post Office Building, in the city of New York, Borough of Manhattan.

Yours,

WM. HAYWARD,
United States Attorney, Attorney for Defendant.

NEW YORK, *December 1, 1921.*

To DEFOREST BROTHERS, Esqs.,
Attorneys for Plaintiff,
30 Broad St., N. Y. C.

6 District Court of the United States for the Southern District of New York.

Amended complaint.

The plaintiffs above named for their amended complaint herein respectfully show to this Court and allege as follows:

1. That Margaret Olivia Sage, a resident of the city, county, and State of New York, died in the said city on the 4th day of November, 1918, leaving a last will and testament, a copy of which is hereto annexed and hereby made a part hereof, and which was duly admitted to probate by the Surrogates' Court of the county of New
7 York, to which jurisdiction in that behalf obtained, and that under and by the terms of said will these plaintiffs were named as executors thereof.

2. That thereafter letters testamentary under said last will and testament of said deceased were duly issued out of and under the hand and seal of the said Surrogates' Court to these plaintiffs, who thereupon duly qualified and have been at all times hereinafter mentioned and are still acting as such executors.

3. Upon information and belief that William H. Edwards at all the times hereinafter mentioned was the collector of United States internal revenue for the Second District of New York and was and still is a resident and inhabitant of the Southern District of New York.

4. That on or about the 18th day of February, 1920, the plaintiffs as executors as aforesaid duly filed with the defendant William H. Edwards as collector as aforesaid a return for the purpose of the determination and assessment of the estate tax upon the said estate, under and pursuant to the provisions of an act of Congress approved September 8, 1916, and known as the revenue act of 1916, as amended by subsequent acts and in particular by the acts of February 24, 1919, known as the revenue act of 1918, and thereafter on the said date, February 18, 1920, paid to the said collector the sum of $1,406,865.07, being the amount of estate tax appearing to be due and payable to the United States Government upon the basis of the said return.

8 5. That subsequently and on or about the 29th day of June, 1921, the Commissioner of Internal Revenue assessed a further and additional estate tax of $525,914.22 upon the estate of said decedent, and thereafter and on or about the 4th day of August, 1921, the defendant William H. Edwards served upon the plaintiffs a notice and demand for the payment of the said additional tax amounting to $525,914.22, and on the 5th day of August, 1921, plaintiffs paid to the defendant, the said William H. Edwards, the said sum of $525,914.22 under protest, except as to the sum of $112.43.

6. That the said sum of $525,914.22 was paid by the plaintiffs under compulsion, duress, and coercion pursuant to said notice and

demand received from said defendant and to avoid the pains and penalties thereby threatened.

7. Thereupon and on the 5th day of August, 1921, the plaintiffs duly appealed to the Commissioner of Internal Revenue by filing with the defendant a claim for refund of the said additional tax of $525,914.22 to the extent of $525,801.79 thereof, upon the ground that the same was illegally and wrongfully assessed and collected, which said claim for refund was thereafter and on the 18th day of October, 1921, rejected and denied by the Commissioner of Internal Revenue, but since the beginning of this action the defendant by his attorney has consented to the entry of judgment in favor of the plaintiffs for the sum of $112,172.17, leaving a balance of $413,629.62 of said additional tax which is still claimed to be due and refundable to these plaintiffs, and neither the said balance nor any part thereof has been remitted, refunded, or repaid to these plaintiffs or to anyone for their account.

9 8. Except for a small difference of $511.05 in the item of furniture and personal effects, which is not disputed by the executors, all of the items constituting the gross estate as contained in the original return filed by the executors are accepted by the Commissioner of Internal Revenue and all deductions claimed by the executors are allowed by the commissioner, except the deduction for charitable, public, and similar bequests.

The will of the decedent contained general legacies for charitable, public, and similar purposes specified in section 403 of the revenue act of 1918, aggregating $1,285,000 and the entire residuary estate is devised and bequeathed to thirty-five separate charitable and educational institutions for said charitable, public, and similar purposes.

The executors claim that the aggregate amount of all said bequests to charitable, public, and similar purposes and which amount under the express provisions of said section 403 of the revenue act of 1918 should be deducted from the gross estate for the purpose of ascertaining the net estate subject to Federal estate tax is $36,721,855.70. The Commissioner of Internal Revenue has determined that the aggregate amount of said charitable, public, and similar bequests to be deducted from the gross estate for the purpose of ascertaining the net estate subject to Federal tax is $34,895,506.75.

9. The amount of the bequests to said charitable, public, and similar purposes to be deducted from the gross estate and the amount of the net estate subject to Federal estate tax and the amount of

10 the said Federal estate tax are ascertained and computed by the executors in the following manner:

The total amount of said bequests and devises to charitable, public, and similar bequests is computed and ascertained as follows:

Gross estate		$49,129,256.99
Deductions for the purpose of ascertaining the amount of the residuary estate:		
Funeral expenses	$4,000.28	
Administration expenses as follows:		

Executors' fees	$1,467,779.32		
Attorneys' fees	300,000.00	$1,767,779.32	
Debts of decedent		2,017,542.14	
General and specific devises and bequests:			
To individuals	$8,618,079.55		
To charitable, public, and similar purposes	1,285,000.00	9,903,079.55	$13,692,401.29
Net residuary estate, all of which is devised and bequeathed to charitable, public, and similar purposes			35,436,855.70
General legacies to charitable, public, and similar purposes			$1,285,000.00
Residuary legacies to charitable, public, and similar purposes			35,436,855.70
Total aggregate amount of bequests and devises to charitable, public, and similar purposes			$36,721,855.70

11 The net estate subject to tax is computed and ascertained as follows:

Gross estate			$49,129,256.99
Deductions as follows:			
Funeral expenses		$4,000.28	
Administration expenses as follows:			
Executors' fees	$1,467,779.32		
Attorneys' fees	300,000.00		
Debts of decedent	2,017,542.14		
Bequests for charitable, public, and similar purposes	36,721,855.70		
Specific exemption under rev. act of 1918	50,000.00	40,557,177.16	40,561,177.44
Net estate subject to tax			$8,568,079.55
Total tax			1,406,977.50

10. The amount of the bequests for said charitable, public, and similar purposes to be deducted from the gross estate and the amount of the net estate subject to Federal estate tax, and the total Federal estate tax, amounting to $1,820,607.12, which includes the balance of $413,629.62 of the additional tax assessed upon the estate, which is disputed by the executors, have been computed, ascertained, and determined by the Commissioner of Internal Revenue as follows:

The amount of the residuary estate devised and bequeathed for charitable, public, and similar purposes is computed, ascertained, and determined as follows:

12 Gross estate			$49,129,256.99
Deductions for the purpose of ascertaining the amount of the residuary estate:			
Funeral expenses		$4,000.28	
Administration expenses, as follows:			
Executors' fees	$1,467,779.32		
Attorneys' fees	300,000.00	1,767,779.32	
Debts of decedent		2,017,542.14	
General and specific devises and bequests:			
To individuals	$8,618,079.55		
To charitable, public, and similar purposes	1,285,000.00	9,903,079.55	
		13,692,401.29	

State inheritance taxes on bequests to individuals under clauses 5 and 6 of the will	85,741.83	
Federal estate tax	1,820,607.12	$15,518,750.24
Net residuary estate devised and bequeathed to charitable, public, and similar purposes		$33,610,506.75

The net estate subject to tax is computed and ascertained as follows:

13 Gross estate		$49,129,256.99
Deductions as follows:		
Funeral expenses	$84,000.28	
Administration expenses as follows:		
Executors' fees	1,467,779.32	
Attorneys' fees	300,000.00	
Debts of decedent	2,017,542.14	
General bequests for charitable, public, and similar purposes	1,285,000.00	
Residuary estate devised and bequeathed for charitable, public, and similar purposes	33,610,506.75	
Specific exemption under rev. act of 1918	50,000.00	38,734,828.49
Net estate subject to Federal tax		$10,394,428.50
Total tax		1,820,607.12

The amount of the residuary estate devised and bequeathed for charitable, public, and similar purposes and the amount of the Federal estate tax as used by the commissioner in the foregoing computations, are obtained by him by the use and application of the following formula, namely:

Formula for arriving at the amount of the deduction allowed when the residue is given to charity and when more than one rate of tax must be used.

Explanation of terms used:

G=Gross estate.
N=Net estate.
R=Residue.
T=Federal estate tax.
D=Known deductions } When taken together known as A.
E=Specific exemption. }
14 S=Property specifically disposed of (this includes specific bequests, transfers, debts, funeral and administration expenses, and State inheritance taxes).
K=Total tax on all blocks up to the last one used.
B=Total of blocks the tax on which is represented by K.
%=Rate of tax on the last block.

Formula.

$G=R+S+T$

(1) $R=G-S-T$

$T=K+\%\ (N-B)$

$T=K+\%\ N-\%\ B$

$T=K+\%\ [G-(A+R)]-\%\ B$

$T=K+\%\ G-\%\ (A+R)-\%\ B$

$T=K+\%\ G-\%\ A-\%\ R-\%\ B$

Substituting in (1)

R=G−S−(K+% G−% A−% R−% B)
R=G−S−K−% G+% A+% R+% B
R−% R=G−S−K−% G+% A+% B

Application of formula to decedent's estate:

G=$49,129,256.99.
N=Net estate, unknown.
R=Residue, unknown.
T=Federal estate tax, unknown.
E, D } A= $5,124,321.74.
S=As used by the commissioner in the application of this formula in this estate includes the following:

Specific and general devises and bequests	$9,903,079.55
Debts	2,017,542.14
Funeral and administration expenses	1,771,779.60
State inheritance taxes as follows:	
Taxes assessed against legacies in clauses 5 and 6 of decendent's will and chargeable against estate by terms of will	5,741.82
Total	$13,698,143.12

K=$1,722,000.00
B=$10,000,000.00
%=25%

Substituting these figures in the formula above leads to the following results:

R−25% of R = G−S−K−% G+% A+% B
75% of R = G−S−K−% G+% A+% B

G	=$49,129,256.99
Deduct S	= 13,698,143.12
	$35,431,113.87
Deduct K	= 1,722,000.00
	$33,709,113.87
Deduct 25% of G	= 12,282,314.2475
	$21,426,799.6225
Add 25% of A	= 1,281,080.4350
	$22,707,880.0575
Add 25% of B	= 2,500,000.00
75% of R	=$25,207,880.0575
Residue	=$33,610,506.75

G = R+S+T
T = G−R−S

Tax=$49,129,256.99−$33,610,506.75−$13,698,143.12
Tax=$1,820,607.12

11. The net estate subject to Federal tax as computed and determined by the Commissioner as above is $10,394,428.50; the net estate subject to Federal tax as computed and ascertained by the executors as above is $8,568,079.55. The difference between the two amounting to $1,826,348.95 equals the amount of the Federal estate tax itself as computed by the Commissioner of Internal Revenue, plus the amount of the inheritance taxes on legacies in clauses 5 and 6 of the will, and the excess of the tax as determined by the Commissioner over the amount of the tax as computed by the executors, being the balance of the additional tax assessed and collected and the refund of which is claimed in this suit, is the tax computed upon said difference of $1,826,348.95.

12. The plaintiffs further show and allege that the method and the formula as above set forth which has been adopted and ap-
17 plied by the Commissioner of Internal Revenue for the purpose of ascertaining and determining the aggregate amount of the residuary bequests and devises for said charitable, public, and similar purposes, the amount of the deduction for all bequests and devises for said charitable, public, and similar purposes, and the amount of the net estate subject to tax and the amount of the tax, all as determined by the Commissioner of Internal Revenue, contravene the express provisions of section 403 of Title 4 of the Revenue act of 1918, as well as the true intent and meaning thereof, and the aggregate amount of such bequests for said charitable, public, and similar purposes, the amount of the net estate subject to tax and the amount of the tax as determined by the Commissioner and as above set forth were and are erroneous, wrongful, and unlawful, and the true and correct aggregate amount of such bequests for said charitable, public, and similar purposes and of the net estate subject to tax, and of the tax properly and lawfully assessable upon the estate of the decedent are as hereinabove set forth in the computation and ascertainment thereof as made by the executors, the plaintiffs herein.

13. The plaintiffs accordingly show and allege that the balance of $413,629.62 of said additional tax assessed upon the estate of the said decedent was illegally and wrongfully assessed and illegally and wrongfully exacted and collected by the defendant from the plaintiffs, and neither on the date of the assessment of the said additional tax by the Commissioner of Internal Revenue, nor on the date of said notice and demand of the defendant, or at any time be-
18 fore or since those dates was there any estate tax whatsoever due and payable from the estate of said decedent beyond the sum of $1,406,977.50 paid by these plaintiffs.

14. That this is a suit of civil nature at law and the cause of action herein set forth arises under the laws of the United States providing for internal revenue.

Wherefore the plaintiffs demand judgment against the defendant in the sum of $413,629.62 or such other sum as is legally payable

and refundable to them from him, together with interest thereon at 6% per annum from the 15th day of August, 1921, together with the costs and disbursements of this action.

DE FOREST BROTHERS,
Attorneys for the Plaintiffs.

Office and post office address, 30 Broad Street, Borough of Manhattan, New York City.

[Certificate of Robert W. De Forest to above paper omitted in printing.]

19 The last will of Margaret Olivia Sage, dated October 25th, 1906.

First codicil, dated February 17th, 1908.

Second codicil, dated July 19th, 1911.

The last will and testament of Margaret Olivia Sage.

I, Margaret Olivia Sage, widow of Russell Sage, of the city of New York, do make, publish and declare this my last will and testament.

20 1. I direct payment of all my just debts.

2. I give and bequeath to my brother Joseph Jermain Slocum, ten thousand dollars, in trust nevertheless to invest the same and keep it invested in such securities as he in his discretion shall deem good and sufficient, and the income therefrom arising to take and have to his own use during his life, and on his death I give and bequeath the said sum of ten thousand dollars to his children who shall then survive him, and the issue of any child or children who may have died leaving issue, to be divided equally among them, the issue of any deceased child taking per stirpes and not per capita. For the information of my brother I add that this sum includes the money which came from my grandfather John Jermain to our mother and from her to me, and which I hope will be of benefit to him and to his children.

3. I give and devise the property owned by me on Main Street, in Sag Harbor, Long Island, New York, consisting of about three acres of land, with the house thereon known as the Luther Cook House, built by my grandfather John Jermain, to my brother Col. Joseph Jermain Slocum, to have and to hold the same during the term of his natural life; and after his death I give and devise the same to his son Herbert Jermain Slocum, to have and to hold the same during the term of his natural life; and after his death I give and devise the same to his son Herbert Jermain Slocum, Junior, in fee simple absolute. Should he have died before his father I give it to the children of my nephews then surviving, share and share alike, per stirpes.

21 4. I give to my executors hereinafter named, other than Joseph Jermain Slocum, one million dollars, to invest and

hold the same in trust during the life of my brother Joseph Jermain Slocum, to apply the income thereof to his use semi-annually, or oftener if practicable, and upon his death to divide the same into as many equal parts as he leaves children or the issue of children him surviving, such issue to take only their parent's share per stirpes. As respects any part allotted to a son, if the son survive him it shall be paid over to such son. If the son predeceases him leaving a widow living at the time of my death, it shall continue to be held in trust during the life of such widow, the income thereof to be applied to her use semi-annually, or oftener if practicable, and upon her death it shall be paid over to his children who survive her, and to the issue of any children who may have predeceased him or her, share and share alike, the issue of any deceased child to take only its parent's share, per stirpes. If the son predecease him without leaving such a widow, it shall be paid over to his children him surviving and to the issue of any children who may have predeceased him, such issue to take only its parent's share, per stirpes, or failing such children or issue of children, to my said brother's next of kin. As respects the part allotted to his daughter, I direct that the same shall continue to be held in trust by my said executors during the life of his said daughter, the income thereof to be applied to her use semi-annually, or oftener if practicable, and upon her death to pay the same over to her children who survive her and to the issue of any children who may have predeceased her, share and share alike, the issue of any deceased child to take it parent's share
22 per stirpes. Should she die before her father, I direct my said executors upon his death to pay the same over to her children in equal shares.

Should my said brother predecease me I dispose of the said million dollars in like manner and with like effect as hereinbefore provided in case of his death after mine.

I also give to each of my nephews Herbert Jermain Slocum and Stephen L'Hommedieu Slocum, the sum of one hundred thousand dollars, and in case of their death before mine I give the same sum to each of their respective wives and children them surviving, in equal shares.

I also give to my niece Margaret Olivia Flint, the sum of one hundred thousand dollars, but I direct that my executors, hereinafter named, shall hold the same in trust during her life, applying the income thereof to her use semi-annually, or oftener if practicable, and upon her death to divide the same among her children her surviving, or the issue of any who may have predeceased her, share and share alike, such issue to take only their parent's share, per stirpes. Should she die leaving no such children or issue her surviving, I give the same to my said brother's next of kin.

5. I give and bequeath the following legacies:

(a) To Sylvanus Pierson Jermain, grandson of my deceased uncle John Jermain, the sum of three thousand dollars.

(b) To Miss Mary Jones Boardman, of St. Paul, Minnesota, the sum of three thousand dollars.

(c) To Mrs. Henrietta Beebe Lawton, of New York City, New York, the sum of three thousand dollars.

23 (d) To Mrs. Clara Boardman Harvey, of Hoboken, New Jersey, the sum of two thousand dollars.

(e) To Miss Bessie C. Rogers, of New York City, New York, the sum of two thousand dollars.

(f) To Mrs. Catharine H. Traub, wife of Captain Traub of the United States Army, the sum of two thousand dollars.

(g) To my cousin Cornelia Jermain Porter, of Geneva, New York, the sum of five thousand dollars.

(h) To my cousin Edward Payson Porter, of New York City, New York, the sum of five thousand dollars.

(i) To my cousin Mrs. Esther Ladue, of Detroit, Michigan, the sum of five thousand dollars.

(j) To my cousin Mrs. Delia Estcourt, of Schenectady, New York, the sum of five thousand dollars.

(k) To my cousin Mrs. Rosina Perry Larmon, of Salem, New York, the sum of five thousand dollars.

(l) To my cousin Eli Perry, of Pittstown, New York, the sum of five thousand dollars.

(m) To my cousin Mrs. Florence Slocum Eddy, now of Tappan, New York, the sum of five thousand dollars.

(n) To each surviving child of my cousin Eliza Oliver Strong, if such there be, the sum of five thousand dollars.

24 (o) To my pastor, the Rev. Dr. Donald Sage Mackay, the sum of twenty-five thousand dollars.

(p) To my friend and relative Dr. D. Bryson Delevan, the sum of twenty-five thousand dollars.

(q) To Dr. Edward G. Janeway, the sum of five thousand dollars.

(r) To Dr. Theodore C. Janeway, the sum of five thousand dollars.

(s) To Dr. Carl Smuck, the sum of five thousand dollars.

I expect to anticipate the payment of some of these legacies by giving them during my lifetime. In so far as I may have given moneys to the legatees named in this clause of my will, and may have charged the same against any such legatees in any of my books, I direct that such payments shall be deemed advances on account of or payment of such legacies as the case may be.

6. I also give the following legacies:

(a) To each servant who is in my employ at the time of my death, and has been continuously in my employ, or the employ of myself and my husband, for ten years or more, the sum of five thousand dollars.

(b) To each servant who is in my employ at the time of my death, and has been continuously in my employ, or in the employ of myself and my husband, for five years or more, the sum of twenty-five hundred dollars.

I direct that all the foregoing legacies included in clauses 5 and 6 be paid in full without diminution for any tax or charge imposed thereon by law.

7. After payment in full of all the foregoing legacies I give and bequeath the following legacies to the following named educational, religious or charitable corporations, and I give such amount in each instance in trust, to be invested and kept invested in such securities as to each corporation or its proper officers in their discretion shall seem good and sufficient, the income therefrom to be devoted to the uses and purposes of each corporation from time to time as it accrues:

(a) To the Troy Female Seminary, from which I graduated in the year 1847, the sum of fifty thousand dollars.

(b) To the Association for the Relief of Respectable Aged Indigent Females in the city of New York, situated at 104th Street and Amsterdam Avenue, the sum of twenty-five thousand dollars.

(c) To the Woman's Hospital in the State of New York, sometimes called The New York State Woman's Hospital, incorporated by an act of the legislatures passed April 18th, 1857, the sum of fifty thousand dollars.

(d) To the Board of Home Missions of the Presbyterian Church of the United States of America, incorporated by the legislature of New York, April 19, 1872, the sum of twenty-five thousand dollars. The income therefrom arising from time to time shall be paid over to The Woman's Executive Committee of Home Missions of the Presbyterian Church for their uses and purposes.

(e) To the Women's Board of Foreign Missions of the Presbyterian Church, a society incorporated under the laws of the State of New York, the sum of twenty-five thousand dollars.

(f) To the New York City Mission and Tract Society, a corporation formed under the laws of the State of New York, the sum of twenty thousand dollars. The income therefrom arising from time to time shall be devoted to the uses and purposes of the Woman's Board of said society.

(g) To the New York Female Auxiliary Bible Society, a corporation created and existing under the laws of the State of New York, whose office is now in the Bible House, so called, in the city of New York, the sum of ten thousand dollars.

(h) To the Children's Aid Society of the city of New York, the sum of ten thousand dollars.

(i) To The Charity Organization Society of the city of New York, the sum of twenty thousand dollars.

(j) To the corporation or society located in the city of Syracuse, in the State of New York, commonly known as The First Presbyterian Church in the said city, whatever be its correct name or designation, the sum of ten thousand dollars, in trust to be invested

and kept invested in such securities as said corporation or
27 its proper officers may deem good and sufficient in their discretion, and the income therefrom arising from time to time to be devoted and applied to the uses and purposes of said church in what is commonly called its mission work.

(k) To the corporation or society located in Sag Harbor, on Long Island, in the State of New York, and commonly known as The Presbyterian Church, or the First Presbyterian Church in Sag Harbor, being the Presbyterian Church with which in her lifetime my grandmother was connected, the sum of ten thousand dollars, the said sum to form a fund which shall be invested and kept invested in such securities as to said church or its proper officers shall seem good and sufficient, as a memorial to my said grandmother whose name I bear, and shall be called by her name, The Margaret Pierson Jermain Fund, and the income therefrom arising from time to time shall be devoted to and used for the ordinary uses and purposes of said church.

8. After payment in full of all the foregoing legacies, I give and bequeath the following other legacies to the educational, religious and charitable corporations hereinafter named:

(a) To the Society for the Relief of Half Orphan and Destitute Children in the City of New York, incorporated in the year 1837, the sum of twenty-five thousand dollars.

(b) To the New York Institution for the Deaf and Dumb, the sum of twenty-five thousand dollars.

28 (c) To the Home for the Friendless, located in the City of New York, the sum of one hundred thousand dollars.

(d) To the New York Exchange for Woman's Work, incorporated in the year 1878, the sum of twenty-five thousand dollars.

(e) To the Woman's National Sabbath Alliance, now located at 156 Fifth Avenue in the City of New York, the sum of twenty-five thousand dollars.

(f) To the Ladies' Christian Union of the City of New York, incorporated in the year 1866, the sum of one hundred thousand dollars.

(g) To the Working Women's Protective Union, incorporated in 1868, the sum of ten thousand dollars.

(h) To the Servants of Relief for Incurable Cancer, incorporated in the year 1901, the sum of twenty-five thousand dollars.

(i) To the Salvation Army, incorporated under the laws of the State of New York, the sum of twenty-five thousand dollars.

(j) To Park College, located at Parkville, Missouri, the sum of one hundred thousand dollars.

(k) To the Idaho Industrial Institute, located at Weiser, Idaho, the sum of one hundred thousand dollars.

(l) To the Old Ladies' Home at Syracuse, with which my
29 mother was associated, and with which Mrs. Frank Hiscock is now associated, the sum of twenty-five thousand dollars.

Should my estate after payment in full of the legacies set forth in the clause of my will preceding this clause not suffice to pay in full

all the legacies set forth in this clause, I direct that the same shall be diminished and abate proportionately.

9. I give to my brother Joseph Jermain Slocum, all my furniture, jewelry, wearing apparel and other like personal effects, not moneys or securities. In case of his death before mine I give the same to my nephews me surviving, share and share alike.

10. I give, devise and bequeath all the rest, residue and remainder of my estate, wheresoever and whatsoever, as follows:

I divide my said residuary estate into fifty-two equal parts, and I give such parts as follows:

(a) To each of the following named educational, religious and charitable societies, named as specific legatees in the seventh clause of this will, and named as such in my last preceding will, viz. the Troy Female Seminary, the Association for the Relief of Respectable Aged Indigent Females in the City of New York, the Woman's Hospital in the State of New York, the Board of Home Missions of the Presbyterian Church of the United States of America, the same to be distributed through its Woman's Executive Committee, the Women's Board of Foreign Missions of the Presbyterian Church, the New York City Mission and Tract Society, the New York Female Auxiliary Bible Society, the Children's Aid Society and The Charity
30 Organization Society of the City of New York, two of such parts.

(b) To each of the following corporations the number of shares set opposite its respective title:

The Presbyterian Board of Relief for Disabled Ministers and the Widows and Orphans of Deceased Ministers ..... One
The Young Men's Christian Association ..... One
The Young Women's Christian Association ..... One
The Metropolitan Museum of Art ..... Two
The American Museum of Natural History ..... Two
The New York Botanical Garden ..... One
The New York Zoological Society ..... One
The New York Public Library ..... One
The Troy Polytechnic Institute, located at Troy, New York ..... One
Union College, located at Schenectady, New York ..... One
Syracuse University, located at Syracuse, New York ..... One
Hamilton College, located at Clinton, New York ..... One
New York University, located in the City of New York ..... One
Yale University, located at New Haven, Connecticut ..... One
Amherst College, located at Amherst, Massachusetts ..... One
Williams College, located at Williamstown, Massachusetts ..... One
Dartmouth College, located at Hanover, New Hampshire ..... One
Middlebury College, located at Middlebury, Vermont ..... One
31 Princeton University, located at Princeton, New Jersey ..... One
Rutgers College, located at New Brunswick, New Jersey ..... One
Bates College, located at Lewiston, Maine ..... One
Barnard College, located in the City of New York ..... One
Bryn Mawr College, located at Bryn Mawr, Pennsylvania ..... One
Vassar College, located at Poughkeepsie, New York ..... One
Smith College, located at Northampton, Massachusetts ..... One
Wellesley College, located at Wellesley, Massachusetts ..... One
The Tuskegee Normal and Industrial Institute, located at Tuskegee, Alabama ..... One
The Northfield Schools, consisting of or including The Northfield Seminary and the Mt. Hermon Boys' School, at Northfield Massachusetts, founded by Mr. Moody, the evangelist ..... One
The New York Infirmary for Women and Children ..... One

The Presbyterian Hospital, in the City of New York ..... One
The Mt. Sinai Hospital, located in the City of New York ..... One
The State Charities Aid Association ..... One

It is my desire that each religious, educational or charitable corporation which may receive a share of my residuary estate shall use the whole or a part of the legacy received by it for some purpose which will commemorate the name of my husband, but I simply express this as a desire and do not impose it as a condition of my gift.

94 I expect during my lifetime to anticipate some of these legacies by giving different amounts from time to time to the educational, religious and charitable corporations named in clauses 7, 8 and this residuary clause of my will. In so far as I may do so, and may charge such amounts in any of my books against any such corporations, or in so far as such gifts amount to ten thousand dollars or more at any one time in any case, such gifts made during my lifetime shall be deemed advances on account of the legacies to which such institutions are entitled under the aforesaid clauses of my will, and their respective legacies in my will, specific or residuary, shall be diminished accordingly.

11. Should any of the religious, educational or charitable corporations named as residuary legatees in my will be incapable for any reason of taking the whole or any part of the legacies given to them, I give, devise and bequeath the amount which any such corporations would have taken if capable of taking, to the other corporations entitled to share in my residuary estate, in the same proportion which the legacy given to each corporation capable of taking bears to the entire amount of legacies given to all such corporations.

12. Should any of the beneficiaries or legatees under this my will object to the probate thereof, or in anywise, directly or indirectly commence, prosecute or aid in the prosecution of any legal proceeding having for its object or possible effect the defeat in whole or in part of any provision of this will, or of any testamentary intention therein declared, I hereby revoke and annul every gift

33 made to such beneficiary or legatee, and it is my will that such beneficiary or legatee shall be absolutely barred and cut off from any share in my estate. Any gift so forfeited shall form a part of my residuary estate and be disposed of as such, or if it be the gift of a residuary interest in my estate then it shall be added to and form part of my gifts to other residuary legatees, in like manner as if such legatees had not been named therein and the number of parts into which my residuary estate is divided had been diminished accordingly.

13. I hereby authorize and empower my executors and trustees hereinafter named to compromise and settle all claims against my estate, in their discretion; to sell, convey and transfer all real and personal estate of which I may die possessed or entitled, at such times, in such manner and upon such terms as in their discretion shall seem most advantageous to my estate; to value for [illegible]rposes

of distribution any of my estate, real or personal, their value to be final and conclusive; to hold as part of the trust funds created by my will any part of my estate, real or personal, at valuations to be fixed by them; to execute and deliver any instruments of conveyance or transfer, and to do all other acts and take all other proceedings in relation to the conveyance or transfer of any of my property, real or personal, which may be necessary or expedient to enable them to exercise the power of sale herein given to them, and to lease any real estate of which I may die possessed, or in which any of my estate given in trust may be invested, for terms not exceeding twenty-one years, and with such covenants for improvements as they may deem expedient.

34 14. I hereby nominate, constitute and appoint my brother Joseph Jermain Slocum, my nephews Herbert Jermain Slocum and Stephen L'Hommedieu Slocum, and my friends Robert W. de Forest and Henry W. de Forest, executors of this my last will and trustees thereunder, except that my brother Joseph Jermain Slocum shall not be a trustee of the legacy hereinbefore given in trust for his benefit.

In case of the death, resignation or disability of any of my said trustees, I authorize the survivor or survivors of them to appoint by instrument in writing a successor in said trust, giving to such successor all the powers herein given to my said trustees named, including that of appointing a successor. I further authorize my said trustees, or any of them, to resign any one of the separate trusts herein contained, and with the consent in writing of the beneficiary or beneficiaries, to appoint any person or persons their or his successor or successors in said trust, with like effect in all respects as if originally named herein.

15. I hereby direct that my said executors and trustees, and their successors, be not required to give any bond or security for the faithful execution by them respectively of their duties as such.

Lastly. I hereby revoke all former or other wills or testamentary dispositions by me at any time heretofore made.

I witness whereof I have hereunto set my hand and seal in duplicate, at Lawrence this twenty-fifth day of October, in the year one thousand nine hundred and six.

MARGARET OLIVIA SAGE. [SEAL.]

35 Signed, sealed, published, and declared as and for her last will and testament by Margaret Olivia Sage, the testatrix, in the sight and presence of us, who in her and each other's sight and presence, and at her request, have hereunto subscribed our names as witnesses thereto, this 25th day of October, A. D. 1906.

JOHNSTON DE FOREST,
7 Washington Square, New York City, N. Y.
J. CARL SCHMUCK,
Lawrence, N. Y.
DELIA GILL,
New York, 632 Fifth Ave.

A codicil to the last will and testament of Margaret Olivia Sage.

I, Margaret Olivia Sage, widow of Russell Sage, of the city of New York, do make, publish, and declare the following to be a first codicil to my last will and testament dated the twenty-fifth day of October, 1906.

1. In addition to the several legacies given by my said will to my brother, Joseph Jermain Slocum, and for his benefit, contained in articles "2," "3," and "4" thereof, I give and bequeath to him the sum of two million dollars ($2,000,000).

It is my expectation that he shall provide out of said two million dollars for his children and grandchildren in such manner as he may think expedient, but this I leave entirely to his discretion and do not qualify by this expression of my expectation the absolute quality of my bequest to him.

36 In case my said brother should die before me, I direct my executors to divide such sum of two million dollars into as many equal parts as my said brother leaves children or the issue of any deceased child or children me surviving, each child to count for one share and the issue of any deceased child to count for one share. I give and bequeath the equal share so set apart for any son or sons to such son or sons absolutely, and I give and bequeath the equal share so set apart for the issue of any deceased child or children to such issue in equal shares per stirpes. As respects the share so set apart for his daughter, Margaret Olivia Flint, I give and bequeath the same to my executors in trust to invest and reinvest the same and to pay in income thereof to her semiannually, or oftener if practicable and upon her death to pay over the principal of the fund to her children who survive her and to the issue of any child or children who may have predeceased her, share and share alike, the issue of any deceased child to take its parent's share per stirpes, and in case she shall leave no issue her surviving to pay over said principal in equal shares to my nephews, Herbert Jermain Slocum and Stephen L'Hommedieu Slocum, in case they shall then be living, and if either or both shall have predeceased my said niece, to pay over the same in equal shares to their issue them surviving per stirpes.

2. I have provided during my lifetime for my cousins named in article "5" of my said will, viz: Cornelia Jermain Porter, Edward Payson Porter, Mrs. Esther Ladue, Mrs. Delia Estcourt, Mrs. Rosina Perry Larmon, Eli Perry, Mrs. Florence Slocum Eddy, and

37 each surviving child of Eliza Olivia Strong by deed of trust of even date herewith, securing each of them an annuity during his or her life. I therefore revoke the legacies of five thousand dollars each given to them by paragraphs (g), (h), (i), (j), (k), (l), (m), and (n) of article "5" of my said will.

3. I give the following specific legacies:

(a) To the Association for the Relief of Respectable Aged Indigent Females of the City of New York the sum of one hundred thousand dollars ($100,000).

(b) To The Northfield Schools, consisting of or including The Northfield Seminary and the Mt. Hermon Boys' School, at Northfield, Massachusetts, founded by Mr. Moody, the evangelist, the sum of One hundred thousand dollars ($100,000).

Should said schools be separately incorporated I divide the said sum of one hundred thousand dollars equally between them.

(c) To Middlebury College, located at Middlebury, Vermont, the sum of one hundred thousand dollars ($100,000).

(d) To Rutgers College, located at New Brunswick, New Jersey, the sum of one hundred thousand dollars ($100,000).

(e) To the Young Men's Christian Association of the City of New York, the sum of one hundred thousand dollars ($100,000).

38 (f) To the Young Women's Christian Association of the City of New York, the sum of one hundred thousand dollars ($100,000).

(g) To Mt. Sinai Hospital, located in the City of New York, the sum of one hundred thousand dollars ($100,000).

(h) To Syracuse University, located at Syracuse, New York, the sum of one hundred thousand dollars ($100,000).

(i) To Hampton Institute, located at Hampton, Virginia, the sum of one hundred thousand dollars ($100,000).

(j) To Idaho Industrial Institute, located at Weiser, Idaho, the sum of one hundred thousand dollars ($100,000).

(k) To Helen Chapin, a niece of my husband Russell Sage, the sum of fifty thousand dollars ($50,000).

(l) To Ellen Sage, widow of Rufus Sage, a nephew of my husband Russell Sage, the sum of fifty thousand dollars ($50,000).

In so far as I have given to any of the aforesaid institutions or corporations named in this article of this codicil between the date of my said will and the date of this codicil, and have charged such gifts in any of my books against any such institution or corporation, such gift shall not be deemed an advance on account of any legacy which I give to any of them under this codicil to my will.

39 I intend to substitute these specific legacies for the residuary legacies given to each of said institutions or corporations by Article "10" of my said will, and I hereby revoke the gift made by the said Article "10" of my said will to each of said institutions or corporations.

The following is a list of the gifts so revoked:

To the Association for the Relief of Respectable Aged Indigent Females of the City of New York, two fifty-second parts.

To the Young Men's Christian Association, one fifty-second part.

To the Young Women's Christian Association, one fifty-second part.

To Middlebury College, located at Middlebury, Vermont, one fifty-second part.

To Rutgers College, located at New Brunswick, New Jersey, one fifty-second part.

To Bates College, located at Lewiston, Maine, one fifty-second part.

To the Northfield Schools, consisting of or including The Northfield Seminary and the Mt. Hermon Boys' School, at Northfield, Massachusetts, founded by Mr. Moody, the evangelist, one fifty-second part.

To the Mt. Sinai Hospital, located in the City of New York, one fifty-second part.

4. I intend to carry out my desire of giving two fifty-second parts of my residuary estate to the Bible cause by giving one and one-half fifty-second parts, or three one hundred and fourth parts, of my residuary estate to The American Bible Society, and one-half of one fifty-second part, or one one hundred and fourth part, to The New York Bible Society, both of which payments I desire to have made through the New York Female Auxiliary Bible Society.

I therefore revoke the gift of two fifty-second parts of my residuary estate given by Article "10" of my said will to the New York Female Auxiliary Bible Society, and give to The American Bible Society one and one-half fifty-second parts, or three one hundred and fourth parts, of my residuary estate, and to The New York Bible Society one-half of one fifty-second part, or one one hundred and fourth part thereof, and I direct that both of said bequests be paid through the New York Female Auxiliary Bible Society. If, however, such Society in either or both of said cases shall refuse or fail to act within thirty days after notice from my said executors of their readiness to pay such legacies I give such legacy or legacies directly to said American and New York Bible Societies.

5. Having hereby revoked the gift of nine fifty-second equal parts of my residuary estate to different institutions or corporations hereinbefore named, I give, devise and bequeath the said nine fifty-second equal parts as follows:

(a) One of said parts to Syracuse University, located at Syracuse, New York, in addition to the one part already given by my said will.

(b) One of said parts to Hampton Institute, located at Hampton, Virginia, of which Dr. H. B. Frissell is now President.

(c) The remaining seven of said parts of the Russell Sage Foundation, organized at my instance in memory of my husband, under Chapter 140 of the Laws of the State of New York for the year 1907, of which I am now President.

6. I expect during my lifetime to anticipate some of the legacies given by said will and by this codicil to some of the educational, religious, and charitable corporations. In so far as I may do so, and such gifts may be charged in any of my books against any such corporations, or in so far as such gifts amount to ten thousand dollars or more at any one time in any case, such gifts made during my lifetime shall be deemed advances on account of the legacies to which such corporations are entitled under my said will and under this codicil

thereto, and their respective legacies, whether given in my said will or by this codicil, or whether specific or residuary, shall be diminished accordingly. I expressed this intention in my will and I repeat it in this codicil.

This provision of my codicil, however, shall not apply to any gifts made by me between the date of my said will and the date of this codicil to the corporation to which I have given specific legacies under article "3" of this codicil, nor shall it apply to any gifts I may at any time make to the Russell Sage Foundation.

7. I repeat as applicable to and part of this and of any subsequent codicil, unless expressly altered therein, the intentions expressed in articles "11" and "12" of my said will, viz:

(a) Should any of the religious, educational, or charitable corporations named as residuary legatees in my will, or this or any
42 subsequent codicil thereto, be incapable for any reason of taking the whole or any part of the legacies given to them, I give, devise, and bequeath the amount which any such corporations would have taken if capable of taking to the other corporations entitled to share in my residuary estate, in the same proportion which the legacy given to each corporation capable of taking bears to the entire amount of legacies given to all such corporations.

(b) Should any of the beneficiaries or legatees under my said will, or this or any subsequent codicil thereto, object to the probate thereof, or in any wise, directly or indirectly, commence, prosecute, or aid in the prosecution of any legal proceeding having for its object or possible effect the defeat in whole or in part of any provision of my said will, or of this or any subsequent codicil thereto, or of any testamentary intention therein declared, I hereby revoke and annul every gift made to such beneficiary or legatee, and it is my will that such beneficiary or legatee shall be absolutely barred and cut off from any share in my estate. Any gift so forfeited shall form a part of my residuary estate and be disposed of as such, or if it be the gift of a residuary interest in my estate then it shall be added to and form part of my gifts to other residuary legatees in like manner as if such legatees had not been named therein and the number of parts into which my residuary estate is divided had been diminished accordingly.

Lastly. Except as herein altered, I confirm all the provisions of my said will dated October twenty-fifth, 1906.

43 In witness whereof, I have hereunto set my hand and seal in duplicate, at New York City, this seventeenth day of February, in the year one thousand nine hundred and eight.

MARGARET OLIVIA SAGE. [SEAL.]

The foregoing codicil is typewriten on one side of six (6) sheets, numbered from 1 to 6, inclusive, each signed by the testatrix, and is signed, sealed, published and declared by Margaret Olivia Sage, the testatrix, as and for a first codicil to her last will and testa-

ment dated the twenty-fifth day of October in the year one thousand nine hundred and six, in the sight and presence of us, who in her and each other's sight and presence, and at her request, have hereunto subscribed our names as witnesses thereto, this seventeenth day of February, A. D. 1908.

JOHNSTON DE FOREST,
7 Washington Square, New York City, N. Y.
WILLIAM MCBRIEN,
280 East 201st St., New York City.
JAMES COGAN,
120 East 11th St., New York City.

44 Second codicil to the last will and testament of Margaret Olivia Sage.

I, Margaret Olivia Sage, widow of Russell Sage, of the city of New York, do make, publish and declare the following to be a second codicil to my last will and testament dated the twenty-fifth day of October, nineteen hundred and six.

In addition to the provision heretofore made by me in my said will and in my first codicil thereto dated February 17, 1908, for the benefit of my brother, Joseph Jermain Slocum, I give and bequeath to him the sum of five million dollars ($5,000,000).

As already expressed in my said first codicil, it is my expectation that he will provide for his children and grandchildren out of my bequest to him in such manner as he may think wise and expedient, but this I leave entirely to his discretion and do not qualify by this expression of my desire the absolute quality of my bequests to him.

In case my said brother should die before me, I direct my executors to divide such sum of five million dollars into as many equal parts as my said brother leaves children or the issue of any deceased child or children me surviving, each child to count for one share and the issue of any deceased child to count for one share. I give and bequeath the equal share so set apart for any son or sons to such son or sons absolutely, and I give and bequeath the equal share so set apart for the issue of any deceased child or children to such issue in equal shares per stirpes. As respects the share so set
apart for his daughter, Margaret Olivia Flint, I give and be-
45 queath the same to my executors, in trust, to invest and reinvest the same and to pay the income thereof to her semi-annually, or oftener if practicable, and upon her death to pay over the principal of the fund to her children who survive her and to the issue of any child or children who may have predeceased her, share and share alike, the issue of any deceased child to take its parent's share per stirpes, and in case she shall leave no issue her surviving to pay over said principal in equal shares to my nephews, Herbert Jermain Slocum and Stephen L'Hommedieu Slocum, in case they

shall then be living, and if either or both shall have predeceased my said niece, to pay over the same in equal shares to their issue them surviving per stirpes.

I give, devise and bequeath to my brother, Joseph Jermain Slocum, to my nephews, Herbert Jermain Slocum and Stephen L'Hommedieu Slocum, and to my niece, Margaret Olivia Flint, in equal shares as tenants in common, my country place at Lawrence, Long Island, comprising the two houses and out-buildings originally owned by my husband, Russell Sage, and the additional plot of land purchased by me of James W. Walsh.

Except as herein altered, I hereby confirm all the provisions of my said Will dated October 25, 1906, and of my First Codicil thereto dated February 17, 1908.

In witness whereof, I have hereunto set my hand and seal at New York City, this 19th day of July, in the year one thousand nine hundred and eleven.

MARGARET OLIVIA SAGE. [SEAL.]

46 The foregoing Codicil is typewritten on one side of two (2) sheets, each signed by the testatrix, and is Signed, Sealed, Published and Declared by Margaret Olivia Sage, the testatrix, as and for a Second Codicil to her last Will and Testament dated the twenty-fifth day of October in the year one thousand nine hundred and six, in the sight and presence of us, who in her and each other's sight and presence, and at her request, have hereunto subscribed our names as witnesses thereto, this 19th day of July, A. D. 1911.

CLARA F. LAFFIN,
14 West 47th St., N. Y.
JOHNSTON DE FOREST,
7 Washington Square, New York City.
ROBERT D. ELDER, JR.,
Cranford, New Jersey.

[Certificate of Clerk of Surrogates' Court to above will and codicils omitted in printing.]

47 United States District Court, Southern District of New York.

Notice of motion for judgment dismissing amended complaint.

[Title omitted.]

48 Please to take notice that upon the amended complaint herein the undersigned will move this court at a stated term for the hearing of motions to be held at the United States courts and post-office building, in the Borough of Manhattan, city, county, State, and Southern District of New York, on the 14th day of April, 1922, at 10 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, for an order granting to the defendant herein judgment dismissing the amended complaint upon

the ground that said amended complaint does not state facts sufficient to constitute a cause of action; and at the time and place aforesaid the undersigned will move this court for such other, further, and general relief as to the court in the premises may seem just and proper.

Dated, New York, April 1, 1922.

WILLIAM HAYWARD,
United States Attorney for the Southern District of New York, Attorney for Defendant.

Office and P. O. address, U. S. Courts and P. O. Building, Borough of Manhattan, city of New York.

To DEFOREST BROTHERS, Esqs.,
Attorneys for Plaintiffs.

49 United States District Court, Southern District of New York.

Opinion.

[Title omitted.]

DeForest Brothers, attorneys for plaintiffs; Robert Thorne, counsel.

Sullivan & Cromwell, amici curiae.

William Hayward, United States attorney for defendant; Richard S. Holmes, Russell D. Burchard, W. Hall Trigg, counsel.

Augustus N. Hand, district judge.

This is an action brought to recover Federal estate taxes alleged to have been erroneously assessed and collected.

50

The gross estate amounted to		$49,129,256.96
The funeral and administration expenses and debts amounted to	$3,789,321.74	
The bequests for charitable, religious, public, and similar purposes, without any deduction for estate taxes or State succession taxes payable under clause 6 of the will out of the residuary estate on bequests to individuals	36,721,855.70	
Specific exemption	50,000.00	
		40,561,177.44
This left a net estate of		$8,568,079.55

according to the return made by the estate upon which would be a total tax of $1,406,977.50.

The Commissioner of Internal Revenue revised this tax by deducting from the bequests for charitable purposes the amount of State transfer taxes, viz, $5,741.83, payable under clause 6 of the will from the residuary estate which went to charity. He also deducted from the residuary estate going to charity the Federal estate tax. This lessened the amount of the charitable bequests which are made deductible in computing the net estate subject to the estate tax and increased the tax accordingly. The sum of $413,629.62 and interest is the amount of overpayment now sought to be recovered.

Section 203 of the revenue act of 1916 provides that for the
51 purpose of the tax the value of the net estate shall be determined by deducting from the value of the gross estate funeral expenses, administration expenses, claims against the estate, and "such other charges against the estate as are allowed by the laws of the jurisdiction whether within or without the United States under which the estate is administered."

Section 403 (a) (3) of the revenue act of 1918 allows as a further deduction:

"(3) The amount of all bequests, legacies, devises or gifts to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any individual, or to a trustee or trustees exclusively for such religious, charitable, scientific, literary or educational purposes. This deduction shall be made in the case of all decedents who have died since December 31, 1917."

The question for consideration is the meaning to be attached to the words "The amount of all bequests, legacies, devises, or gifts" when applied to a residuary gift to charity. This amount, whatever it may be, is what is to be deducted in finding the net estate upon which the tax is to be calculated. The charitable recipients of the testator's bounty ultimately receive only a balance consti-
52 tuted after the Government has taken out the estate tax levied as an excise tax upon the privilege granted to the testator of transmitting his property at death. In the case of an estate bequeathed to a single individual the estate tax might have been computed upon what he would receive after the estate had suffered diminution by the tax itself, but such has never been the practice, and the uniform theory has been that the estate passing was to be treated without regard to the incidence of the tax itself. I see no reason why a different rule should be adopted in dealing with the words "The amount of all bequests, legacies, devises, or gifts" even when applied to a residue to charity. In the first case if the taxes had been computed upon the amount actually passing after deducting the tax, millions of dollars would have been saved to taxpayers. It does not seem consistent to look at the matter in a different way in dealing with the present case, particularly in view of the liberal legislation enacted in aid of charitable gifts.

The State legacy tax, amounting to $5,741.83, payable out of the general estate under clause 6 of the will, would not, under the New York decisions, be deductible from the residuary estate in appraising the value of that estate for the purpose of transfer taxes. Matter of Swift, 137 N. Y. 77.

The Government in this case wishes to increase the net taxable estate by reducing the deductible residuary bequests to charity

which have to pay this $5,741.83 to the extent of that sum. In my opinion, the decision of the New York courts in construing the transfer tax act should not control the present situation. If the New York courts had reached any other decision than the one
53 they did and had held that a direction to pay a tax upon a legacy to A out of the general estate lessened the general estate for purposes of taxation by the amount of the tax on A's legacy, the effect would have been to free the estate from any tax on the amount saved to A by the direction that the tax on his legacy should be paid from another fund. Such a result was unreasonable, and the New York court properly held was not within any justifiable construction of the statute.

In the present case, however, there is a direction under clause 6 of the will that taxes on legacies to certain individuals should be paid out of the general estate. It may well be that this direction should not affect the amount or method of ascertaining any legacy tax, but where the deduction allowed for charitable bequests in computing the net taxable estate is limited to the amount of such bequests a specific charge by the terms of the will upon a portion of the estate bequeathed to charity alters the plain testamentary disposition of the testator's property to that extent and limits the amount of the charitable bequests pro tanto. It will be said that if the subtraction of the amount of all bequests to charity is to take into account legacy taxes payable out of such bequest by the terms of the will, it should take into account the Federal estate tax which is a legal charge upon the estate. I do not think the cases are parallel. The testator by her own direction limited the amount which the residuary legatees would receive by the legacy taxes. On the other hand, the uniform practice has been to disregard the Federal estate tax itself in determining the net estate. It is reason-
54 able to apply the same rule in determining what is the residue which the testatrix gave to charity for the purpose of claiming the statutory deduction. Judge Ross in Dugan vs. Miles, 276 Fed. 401, followed this rule.

The motion for judgment dismissing the amended complaint is denied, and judgment is directed for the plaintiffs, with interest, except as to the tax on the sum of $5,741.83, which sum should be deducted from the residue passing to charity and thus added to the net estate for the purposes of taxation.

A. N. H., *D. J.*

June 20, 1922.

55 In United States District Court.

Order denying motion for judgment.

At a stated term of the District Court of the United States for the Southern District of New York, held at the Post Office Building in the borough of Manhattan, city and State of New York, on the thirteenth day of July, 1922.

Present, Honorable Augustus N. Hand, District Judge.

[Title omitted.]

The defendant by his attorney William Hayward, Esq., United States Attorney for the Southern District of New York having moved for judgment dismissing the amended complaint herein upon the ground that the same does not state facts sufficient to con-
56 stitute a cause of action and for such other or further relief as to the court in the premises may seem just and proper, and said motion having come on duly to be heard:

Now after hearing Richard S. Holmes, Esq., Special Assistant United States Attorney, of counsel for the defendant, in support of the motion, and Robert Thorne, Esq., of counsel for the plaintiffs, opposed; it is

Ordered that the said motion be and the same hereby is denied: And it is

Further ordered that the defendant shall have leave to file and serve an answer to the amended complaint within ten (10) days after the service of a copy of this order with notice of entry thereof, and upon his failure to serve and file an answer within such time that the plaintiffs herein shall have judgment against the defendant in the full amount alleged in the amended complaint to be due, less, however, the sum of twelve hundred sixty-three and 20/100 dollars ($1.263.20) being the amount of the Federal estate tax computed upon the sum of fifty-seven hundred forty-one and 83/100 dollars ($5,741.83), the amount of the State estate and inheritance taxes upon the legacies contained in clauses 5 and 6 of the decedent's will, and that judgment shall be entered herein accordingly in favor of the plaintiffs and against the defendant in the total sum of four hundred and twelve thousand three hundred sixty-six and 42/100 dollars ($412,366.42), with interest thereon at 6% per annum from the 5th day of August, 1921, the date of the entry of said judgment, together with the costs and disbursements of this action.

AUGUSTUS N. HAND, *D. J.*

57 United States District Court, Southern District of New York.

Affidavit for judgment.

[Title omitted.]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss:*

Robert Thorne, being duly sworn, says that he is a member of the firm of De Forest Brothers, attorneys for the plaintiffs in the above entitled action.

Deponent further says that a copy of an order dated July 13th, 1922, and filed and entered herein in the office of the clerk of this court on July 15th, 1922, has been duly served upon William Hayward, Esq., the defendant's attorney, together with notice of entry

thereof, and that the said William Hayward, Esq., the defendant's attorney, has admitted service of a copy of the said order
58 and notice of entry thereof on the 16th day of July, 1922, and that the defendant has failed to file and serve an answer herein within ten days after the said date, and the plaintiffs accordingly are now entitled to enter judgment herein against the said defendant pursuant to the terms of the said order.

ROBERT THORNE.

Sworn to before me this 27th day of July, 1922.

ALAN H. COLCORD,
Notary Public, Kings County, No. 3481.

Kings County register's No. 3089.
Certificate filed New York County No. 97.
Certificate filed New York Co. register's No. 3097.
My commission expires March 30, 1923.

59 United States District Court, Southern District of New York.

Judgment.

[Title omitted.]

The defendant by his attorney William Hayward, Esq., United States attorney for the Southern District of New York, having moved for judgment dismissing the amended complaint herein upon the ground that the same does not state facts sufficient to constitute a cause of action, and for such other and further relief as to the court in the premises may seem just and proper; and said motion having come on duly to be heard before the Hon. Augustus N. Hand, district judge, and an order having been duly filed and entered herein on the 15th day of July, 1922, denying the said motion and directing that the defendant shall have leave to file and serve an answer to the amended complaint within ten days after the service of the
60 said order with notice of entry thereof, and upon his failure to serve and file an answer within such time that the plaintiffs herein shall have judgment against the defendant in the full amount alleged in the amended complaint to be due, less, however, the sum of twelve hundred sixty-three and 20/100 dollars ($1,263.20), being the amount of the Federal estate tax computed upon the sum of five thousand seven hundred forty-one and 83/100 dollars ($5,741.83), the amount of the estate and inheritance taxes upon the legacies contained in clauses 5 and 6 of decedent's will, and that judgment shall be entered herein accordingly in favor of the plaintiffs and against the defendant in the total sum of four hundred and twelve thousand three hundred sixty-six and 42/100 dollars ($412,366.42), with interest thereon at six per cent (6%) per annum from the 5th day of August, 1921, the date of the entry of said judgment, together with the costs and disbursements of this action; and the defendant having failed to file and serve an answer to the said amended complaint within ten days after the service of the said order with notice of

entry thereof as appears from the affidavit of Robert Thorne, verified the 27th day of July, 1922, and filed herewith; it is

Adjudged that the plaintiffs have and recover of the defendant the sum of four hundred and twelve thousand three hundred sixty-six and 42/100 dollars ($412,366.42), with interest thereon from the 5th day of August, 1921, to this date and amounting to the sum of twenty-four thousand one hundred ninety-two and 16/100 dollars ($24,192.16), and making in all the sum of four hundred and
61 thirty-six thousand five hundred fifty-eight and 58/100 dollars ($436,558.58), and that the said plaintiffs have execution against the defendant therefor.

Judgment signed this 28th day of July, 1922.

ALEX. GILCHRIST, Jr.,
Clerk.

United States District Court, Southern District of New York.

Certificate of probable cause.

[Title omitted.]

The above-named defendant having moved for judgment dismissing the amended complaint herein and said motion having
62 duly come on to be heard by this Court on the 2nd day of May, 1922, and an order having been duly made and entered herein on the 15th day of July, 1922, denying the motion of defendant herein and ordering that the defendant have leave to file and serve an answer to said amended complaint within ten days after the service of a copy of the said order with notice of entry thereof and upon his failure to serve and file an answer within such time that the plaintiffs have judgment against the defendant for the sum of four hundred and twelve thousand three hundred sixty-six and forty-two hundredths dollars ($412,366.42) with interest thereon from the fifth day of August, 1921, and said defendant having failed to serve and file an answer within the time limited and judgment having been entered in favor of the plaintiffs and against the defendant on the 27th day of July, 1922, for the sum of four hundred and twelve thousand three hundred sixty-six and forty-two hundredths dollars ($412,366.42) with interest thereon from the 5th day of August, 1921, amounting to twenty-four thousand one hundred ninety-two and sixteen hundredths dollars ($24,192.16) in all the sum of four hundred thirty-six thousand five hundred fifty-eight and forty-eight hundredths dollars ($436,558.48).

Now, therefore, pursuant to section 989 of the Revised Statutes of the United States, I hereby certify that there was probable cause for the acts done by the defendant collector of internal revenue for the second district of New York in the collection of the taxes which are the subject of this action and for the amount of which judgment has been rendered against him.

Dated, New York, July 28, 1922.

AUGUSTUS N. HAND,
United States District Judge.

63 United States District Court, Southern District of New York.

Petition for and order allowing writ of error.

[Title omitted.]

Comes now William H. Edwards, formerly collector of internal revenue for the second district of New York, defendant herein, and says that on or about the 28th day of July, 1922, this court entered final judgment herein in favor of the plaintiffs and against said defendant in the sum of four hundred thirty-six thousand five hundred fifty-eight and fifty-eight hundredths dollars ($436,558.58) in which judgment, and in the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of said defend-

64 ant, all of which errors more fully appear in the assignments of errors filed with this petition.

Wherefore, defendant prays that a writ of error may issue in his behalf out of the United States Circuit Court of Appeals for the Second Circuit for the correction of the errors so complained of and that a transcript of the record, proceedings, and papers in this cause duly authenticated may be sent to said United States Circuit Court of Appeals for the Second Circuit and that such other and further proceedings may be had herein as may be just and proper in the premises.

WILLIAM HAYWARD,
United States Attorney for the Southern District of New York, Attorney for Defendant.

The foregoing petition is granted and the writ of error allowed.
Dated, New York, July 31, 1922.

AUGUSTUS N. HAND,
United States District Judge.

65 United States District Court, Southern District of New York.

Assignments of error.

[Title omitted.]

Comes now William H. Edwards, formerly collector of internal revenue for the Second District of New York, the defendant herein, and assigns error in the decision of the United States District Court for the Southern District of New York in the above-entitled cause and in the rendition of the judgment therein as follows:

1. The court erred in denying defendant's motion for judgment dismissing the amended complaint herein.

66 2. The court erred in rendering judgment against the defendant herein in the sum of four hundred thirty-six thousand five hundred fifty-eight and fifty-eight hundredths dollars ($436,558.58).

3. The court erred in its construction of section 403 (a) (3) of the revenue act of 1918.

4. The court erred in holding and deciding that the amount of the Federal estate tax imposed upon the estate of Margaret Olivia Sage, deceased, was part of the amount of the residuary bequests to charity, given by her last will and testament.

5. The court erred in holding and deciding that under section 403 (a) (3) of the revenue act of 1918 plaintiffs were entitled to deduct from the gross estate of said decedent, as defined by section 202 of the revenue act of 1916, as the amount of the residuary bequests to charity, the amount which remained after deducting from said gross estate, funeral and administration expenses, the debts and specific and general legacies, undiminished by the amount of the Federal estate tax imposed by law upon the estate of said decedent.

Wherefore, defendant prays that for the errors aforesaid the judgment entered herein on the 28th day of July, 1922, be reversed with costs.

Dated, New York, July 31, 1922.

WILLIAM HAYWARD,
United States Attorney for the Southern District of New York, Attorney for Defendant.

67 *Citation.*

[Omitted in printing.]

68 United States District Court, Southern District of New York.

Stipulation as to record.

[Title omitted.]

It is hereby stipulated and agreed by and between the parties hereto that the foregoing is a true transcript of the record of the United States District Court for the Southern District of New York in the above-entitled cause.

Dated, New York, August 29th, 1922.

DE FOREST BROTHERS,
Attorneys for Plaintiffs.
WM. HAYWARD,
United States Attorney, Attorney for Defendant.

69 United States District Court, Southern District of New York.

Clerk's certificate.

[Title omitted.]

I, Alex. Gilchrist, jr., clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a true transcript of the record of said District Court in the above-entitled cause as agreed upon by the parties.

In testimony whereof I have caused the seal of said court to be hereunto affixed at the city of New York, in the Southern District of New York, this 29th day of August, in the year of our Lord one thousand nine hundred and twenty-two and of the independence of the United States the one hundred and forty-seventh.

[SEAL.] ALEX. GILCHRIST, Jr., *Clerk.*

70 United States Circuit Court of Appeals for the Second Circuit.
No. 109—October Term, 1922.

Argued December 12, 1922. Decided January 8, 1923.

[Title omitted.]

Before Rogers, Hough, and Mayer, Circuit Judges.

Writ of error to judgment entered in the District Court for the Southern District of New York.

71 *Opinion.*

Action was brought by defendants in error as executors, &c., of Mrs. Sage to recover part of the estate tax assessed against them as such executors and paid under protest to the defendant, who at the time was a collector of internal revenue.

Mrs. Sage died November 4, 1918, a resident of New York, and by her will disposed of her estate in a manner sufficiently set forth as follows:

(1) The usual provision as to payment of debts; (2) certain pecuniary and specific legacies with directions that some should be paid free of all legacy or inheritance taxes; (3) the residue to be divided into a certain number of equal parts and each part given to a named educational, religious, or charitable corporation.

This estate was subject to the estate tax established by revenue act of 1916 (39 Stat. 756), sec. 201, reading:

"That a tax * * * equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this act, whether a resident or nonresident of the United States: * * *."

The phrase "gross estate" is defined by sec. 202 as follows:

"That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated."

Sec. 203 treats of "net estate" thus:

"That for the purpose of the tax the net estate shall be determined—

"(a) In the case of a resident by deducting from the value of the gross estate—

72 "(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, and from theft, when such losses are not compensated for by insurance or otherwise, support during the settlement of the estate of those dependent upon the decedent, and such other charges against the estate as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered; and

"(2) An exemption of $50,000."

The revenue act of 1918 (40 Stat. 1057) added and made retroactive so as to include this estate a third item of deduction, viz:

"The amount of all bequests * * * to or for the use of any corporation organized and operated exclusively for religious, charitable * * * or educational purposes," &c.

Disregarding all inheritance legacy, transfer or estate taxes, the facts about the property passing under this will were as follows:

Debts and expenses	$3,789,321.74
Pecuniary legacies for charitable, &c., purposes	1,285,000.00
Pecuniary legacies for non-charitable purposes	8,618,079.55
Residuary estate to charitable, &c., purposes	35,436,855.70
Gross	$49,129,256.99

The New York inheritance tax on such legacies as the will declared free of tax was $5,741.83. Plaintiff executors stated the return for United States estate tax thus:

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Gross		$49,129,256.99
Deductions:		
(1) Debts, &c.	$3,789,321.74	
(2) Charitable, &c., legacies other than residual	1,285,000.	
(3) Residuary for charity, &c	35,436,855.70	
(4) Specific exemption	50,000.00	$40,561,177.44
Net estate		$8,568,079.55

The above shows that what was offered for tax, i. e., the "net estate," is exactly the aggregate of pecuniary bequests to other than charitable, &c., purposes, less the specific statutory exemption. The proper tax on this net figure is admittedly $1,406,977.50.

To this the commissioner objected, and restated the return by adopting all the executors' figures except those for the "Residuary for charity, &c.," which he reduced to $33,610,506.75, thereby increasing the "Net estate" by the amount of the reduction; and on investigation this difference is found to be exactly the total of the estate tax assessed, viz:

	$1,820,607.12
And the New York inheritance tax above mentioned, viz	5,741.83
Or	$1,826,348.95

This result, which plainly involves paying an estate tax on the amount of the tax paid, was reached in a manner to be treated in our opinion. The executors sued after protest, and the trial court

gave judgment on demurrer for all taxes over what they admitted as per their return, except that on or measured by the $5,741.83 of State tax. The collector then brought this writ.

Richard S. Holmes, special assistant U. S. attorney, for plaintiff in error;

74 Robert Thorne for defendants in error.

Sullivan & Cromwell by permission filed brief as amici curiae.

Hough, *C. J.*:

That this is not an inheritance or legacy tax, that it is not payable by legatees or out of legacies as such, and that it is a tax payable out of and on the estate and by the executors is agreed (Matter of Hamlin, 226 N. Y., 407), and no complaint is now made as to including in whatever is taxed or measures tax the New York inheritance taxes. (New York, &c., Co. *cs.* Risner, 256 U. S., 345.)

Taxes, however, are not laid on abstractions, names do not change facts, and every tax ultimately falls on some person, unless it be laid upon a thing without an owner, which is rare.

So far as the words of this statute are concerned, the United States does not care who ultimately bears the weight of this tax; it announces the sum and demands payment from the executors; if the legatees and devisees cannot agree as to the burden bearing, the State courts can settle the matter. The New York courts have settled it, so far as this estate is concerned, by the Hamlin case (supra), and this tax is payable out of the whole estate as a permanent charge, which in effect casts it on or takes it out of the residuary. That the residuary estate is devoted to charity, &c., makes no difference.

We impute no motives, but it seems as if this New York rule were the suggestion for the method of tax laying here insisted on by the Treasury.

The train of reasoning is that there cannot be a residuary estate until paramount charges are paid; therefore the true residuary is approximately what in the absence of any tax would be residuum—less the tax itself; but since such an amount of money cannot be left untagged or otherwise at large it must go somewhere else, and the natural place to go is the net estate. It is urged insistently

75 that since the residuary charities will not get what the United States takes, and would get that much more if the United States took nothing, what they do not get must be taxable, and since that which is taxable or measures tax is called "net estate" by the statute, there it must go.

Assuming this as truth, the tax layer perceives that the "net estate," which is practically synonymous with taxable estate, is to receive argumentation by an unknown amount, which renders its own figure unknown; but this baffles arithmetic, so he has recourse to an algebraic formula, which has played an unduly important part in the arguments at bar.

76 We have treated this formula in a footnote:* it is only legally important in that it has produced the argument that any method of taxation or of working out taxes that requires so much algebra "must be wrong." We need not go so far, but do hold that the presumption is that Congress intended a simpler method, one that a plain man could understand. Algebraic formulæ are not lightly to be imputed to legislators.

It is next observable that this using of tax to measure tax will only happen when the residuary estate or some part of it is devoted to charity or other deductible purpose. If this testatrix had made her charitable bequests before inserting a residuary clause no difficulty would have arisen. It is argued with apparent seriousness that this is "something for which the testatrix is responsible," which is true only if the law laid such a trap as this for charitable residuary legatees as distinguished from equally charitable general legatees—again something not lightly imputable to the lawgiver.

But all states do not treat the incidence of the tax as does New York: and if distributees were ratably assessed by the tribunal of administration to pay the estate tax, or if all estate taxes were treated as "a charge against the estate," the reasoning by which this tax is supported would fail. The result would be confusion, again something not to be imputed to the act if it can be avoided.

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*Let G=gross estate, i. e., the amount above given.
A=sum of debts, expenses, nonresiduary legacies to charity, &c., and statutory exemption, i. e., $5,124,321.74.
S=aggregate of all nonresiduary legacies, debts, expenses, and State inheritance taxes on "free of tax" legacies, i. e., $13,698,143.12.
K=total tax on all blocks up to the one last used, assumed to be $1,722,000.
B=total of blocks on which the tax is K, assumed to be $10,000,000.
%=rate of tax on last block, assumed as 25%.
N=net estate, R=residue, and T=estate tax, all three assumed as unknown.

Then $G=R+S+T$
$T=K+\%(N-B)$
$N=G-(A+R)$

From these three equations by a cumbrous system of substitutions is evolved the final formula—equation, viz:

$$75\% \text{ of } R=G-S-K-\%G+\%A+\%B$$

The assumed unknown R is now expressed in terms of known quantities, and can be translated into figures, and this done, satisfaction of the equations first stated follows.

This sounds impressive, but it all starts from the assumption that B equals $10,000,000; for that implies that N, which, of course, includes B, is over that sum. But the only possible reason for asserting N to be more than ten million is to observe that the obvious tax measure; i. e., the sum of noncharitable legacies plus the admitted tax is nearly ten million.

But neither N nor B can possibly be ten million, unless the tax pro tonto measures itself. Thus the mathematician has assumed the whole legal question; has assumed as law that the tax is measured by an entity which includes the tax. The formula is only useful in reaping the fruits of this assumption concerning the law.

If the statutory language is considered with some attention to legal history, the phrase "net estate" is not new but very old.
77 It conveys the plain meaning of what is left as available for instant use, it is the clear or clean estate, a synonym unusually suggestive of the original French word. The net estate resulting from the legal invention of using a tax to measure a tax does not respond to that concept; it is but a fiction, never to be found except in a tax sheet. This is artificial, not real, and is to be avoided if at all possible.

Again, observing the language of the statute, it may be admitted that net estate is used but as a measure for tax, and is not itself taxed, for the impost is said to fall upon the entire property. This is mere matter of words; for practical purposes the net estate is the taxable estate.

It is therefore a fundamental objection, not only as to the spirit but the letter of this act, that the taxable estate is augmented by a deliberate and designed encroachment upon charities.

It is the intent of the statute that charitable bequests shall not be taxed. By its regulation of the incidence of the tax, New York does in fact diminish in favor of the United States what the charities receive; but it must be wrong for the executive departments of the United States to use the rule of incidence, which is of State creation, to increase its own exactions.

As Holmes, J., remarked in the New York Trust Co. case, supra, "Upon this point a page of history is worth a volume of logic." History, so far as we can discover, shows no other instance of attempting to measure a tax pro tanto by itself. As Hand, J., said in the court below, this theory departs from long-established practice and from the usage if not the law of never regarding the incidence of a tax in the levying of a tax.

So far as the authority goes, Dugan vs. Miles, 276 Fed. 401, is the only decision suggested on this branch of the statute. The facts in that litigation were legally identical with those at bar; yet it is true that the doctrine here contended for by the Treasury was not alluded to by the experienced and able judge who wrote the opinion, although his result is consistent only with the methods pursued by these
78 defendants in error. The inference is that neither the judge nor counsel on either side thought of such a theory—which does not seem to us surprising.

Being of opinion, therefore, that the scheme of taxation insisted on by plaintiff in error is unjust, opposed to long-established practice and the spirit of the statute, that it is not required by the language of the act, and tends to confusion taking the country over, the judgment below should be and is affirmed, with costs.

79 At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the court rooms in the Post Office Building in the city of New York, on the 15th day of January, one thousand nine hundred and twenty three.

Judgment.

(*Filed Jan. 15, 1923.*)

Present: Hon. Henry Wade Rogers, Hon. Charles M. Hough, Hon. Julius M. Mayer, Circuit Judges.

[Title omitted.]

Error to the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be, and it hereby is, affirmed.

H. W. R.
C. M. H.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

80 [File endorsement omitted.]

81 *Clerk's certificate.*

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 80, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of William H. Edwards, as collector, etc., plaintiff in error, against Joseph Jermain Slocum et al., as executors, etc., defendants in error, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 15th day of March in the year of our Lord one thousand nine hundred and twenty-three and of the independence of the said United States the one hundred and forty-seventh.

[SEAL.] WM. PARKIN,
Clerk.

82 *Writ of certiorari and return.*

(Filed Oct. 26, 1923.)

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the honorable the judges of the United States Circuit Court of Appeals for the Second Circuit, greeting:

Being informed that there is now pending before you a suit in which William H. Edwards, formerly collector of internal revenue for the second district of New York, is plaintiff in error, and Joseph Jermain Slocum, Herbert Jermain Slocum, Stephen L'Hommedieu Slocum, Robert W. de Forest, as executors of the last will and testament of Margaret Olivia Sage, deceased, are defendants in error, No. 109, October term, 1922, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court
83 of the United States, do hereby command you that you send without delay to the said Supreme Court as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-fourth day of October, in the year of our Lord one thousand nine hundred and twenty-three.

[SEAL.] WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

(Indorsed:) File No. 29524. Supreme Court of the United States, No. 276, October term, 1923. William H. Edwards, Formerly Collector of Internal Revenue, etc., vs. Joseph Jermain Slocum et al. Writ of certiorari.

84 In the Supreme Court of the United States, October term, 1923.

[Title omitted.]

Stipulation as to return to writ of certiorari.

It is hereby stipulated by counsel for the parties to the above entitled cause that the certified copy of the transcript of the record now on file in the Supreme Court of the United States shall constitute

the return of the clerk of the United States Circuit Court of Appeals for the Second Circuit to the writ of certiorari granted therein.

JAMES M. BECK,
Solicitor General.

ROBERT THORNE,
Counsel for Respondents.

85 *To the honorable the Supreme Court of the United States, greeting:*

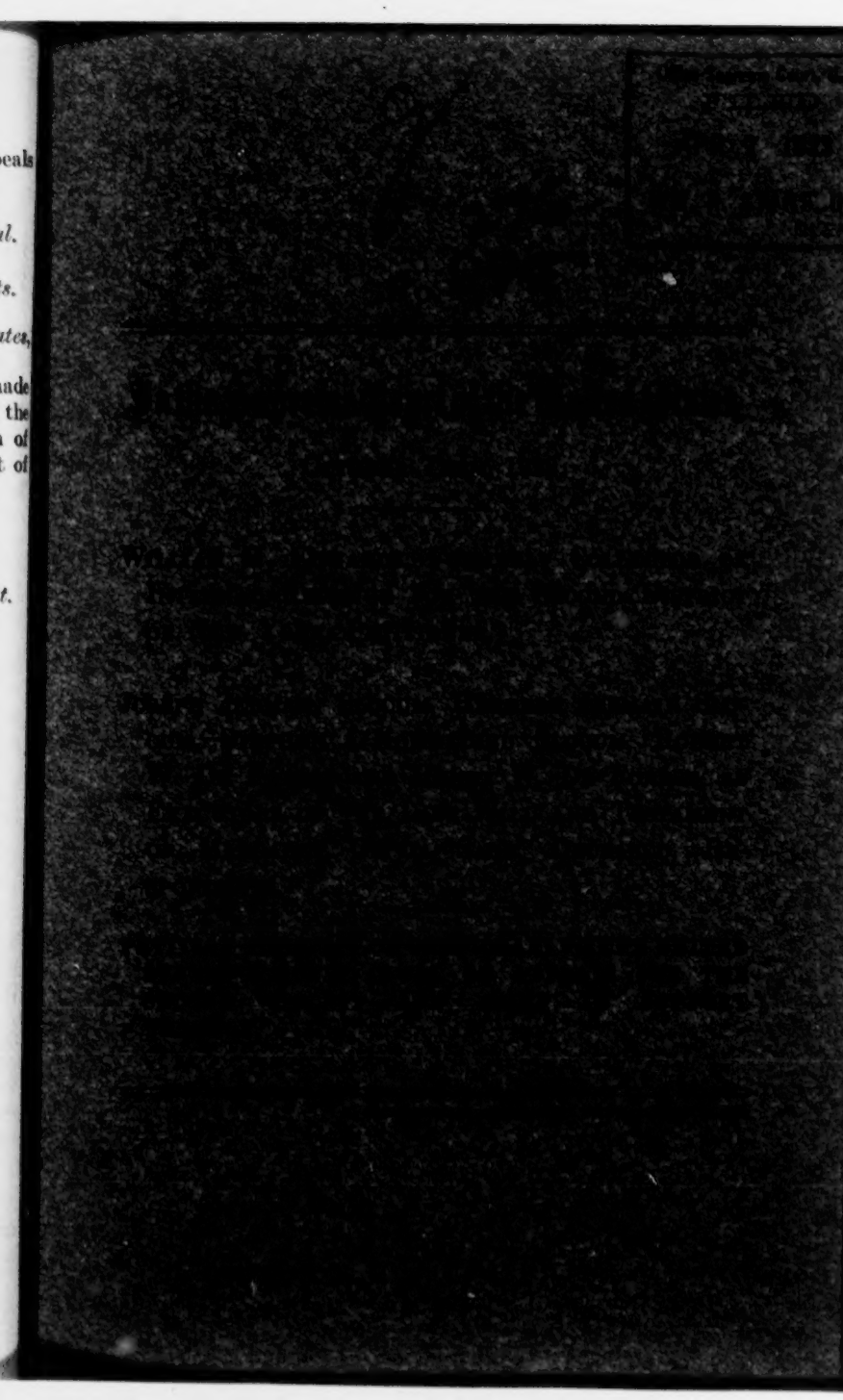
The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the Clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated October 25, 1923.

[SEAL.] WM. PARTIM,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

86 [File endorsement omitted.]

87 [File endorsement omitted.]



In the Supreme Court of the United States

OCTOBER TERM, 1922.

WILLIAM H. EDWARDS, FORMERLY Collector of Internal Revenue for the Second District of New York, Petitioner,

v.

JOSEPH JERMAIN SLOCUM, HERBERT Jermain Slocum, Stephen L'Hommedieu Slocum, Robert W. De Forest, and Henry W. De Forest, as Executors of the Last Will and Testament of Margaret Olivia Sage, deceased, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

The Solicitor General of the United States in behalf of William H. Edwards, former Collector of United States Internal Revenue for the Second District of New York, prays for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Second Circuit rendered in the above entitled case on January 8, 1923, affirming the judgment of the District Court of the United

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States for the Southern District of New York, entered after the denial of petitioner's motion for judgment dismissing the amended complaint upon the ground that the same did not state facts sufficient to constitute a cause of action.

QUESTION INVOLVED.

1. The testatrix, Margaret Olivia Sage, left her entire residuary estate to charities.

2. Section 403 (a) (3) of the Revenue Act of 1918, retroactive and applicable to the tax on Mrs. Sage's estate, permits a deduction from the statutory gross estate of the "amount of" all gifts to charities.

3. The federal estate tax is paid out of and consequently diminishes the amount of the residuary gifts to charity.

THE ISSUE.

Since under Section 403 (a) (3) of the Revenue Act of 1918 the executors are authorized to deduct from the statutory gross estate the "amount of" the residuary bequest to charity, may they treat such bequest as undiminished by the federal estate tax, and by doing so deduct an amount greater than was either given to or received by the residuary legatees?

STATEMENT OF THE CASE.

This is a suit by Joseph Jermain Slocum and others as executors under the last will and testament of Margaret Olivia Sage, deceased, against the defendant as former Collector of Internal Revenue to recover the sum of $413,629.62, the amount of a cer-

tain additional assessment made against such executors on account of the estate tax due from them on the transfer of the decedent's estate.

Mrs. Sage by her will and codicils bequeathed certain sums to individuals, provided for general legacies to certain charitable organizations, and devised and bequeathed her entire residuary estate to thirty-five charitable and educational institutions.

Under the provisions of Title II of the Revenue Act of 1916, and the retroactive provision contained in Section 403 (a) (3) of the Revenue Act of 1918, the executors computed the value of the residuary estate by deducting from the statutory "gross" estate the amount of the general legacies, debts, administrative expenses, and other charges without reference to the federal estate tax. Upon review and audit of the return rendered by the executors the Commissioner of Internal Revenue recomputed the value of the residuary estate by subtracting therefrom the amount of the federal estate tax due the Government. The resulting additional tax was duly assessed and paid under protest and suit for the recovery thereof brought in the United States District Court for the Southern District of New York. The defendant made a motion for judgment dismissing the complaint on the ground that it failed to state a cause of action. The United States District Court for the Southern District of New York denied the motion and final judgment was entered for the amount demanded in the amended complaint.

On appeal, the United States Circuit Court of Appeals for the Second Circuit affirmed the judgment of the District Court.

STATUTES INVOLVED.

Section 201 of the Revenue Act of 1916 (Act of September 8, 1916, 39 Stat. 756) provides in part as follows:

> That a tax * * * equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States; * * *.

This section was amended by Section 300 of the Act of March 3, 1917 (39 Stat. 1000), increasing the rates of tax, and by Section 900 of the Revenue Act of 1917 (Act of October 3, 1917, 40 Stat. 300) additional estate taxes were levied upon the transfer of the estates of decedents dying after the passage thereof. Section 203 of the Revenue Act of 1916 provides in part as follows:

> That for the purpose of the tax the value of the net estate shall be determined—
>
> (a) In the case of a resident, by deducting from the value of the gross estate—
>
> (1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty,

and from theft, when such losses are not compensated for by insurance or otherwise, support during the settlement of the estate of those dependent upon the decedent, and such other charges against the estate as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered; and

(2) An exemption of $50,000;

Section 403 (a) (3) of the Revenue Act of 1918 (Act of February 24, 1919, 40 Stat., 1057) provides:

That for the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

* * * * *

(3) The amount of all bequests, legacies, devises, or gifts, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, scientific, literary, or educational purposes. This deduction shall be made in case of the estates of all decedents who have died since December 31, 1917; * * *.

REASONS FOR GRANTING THE PETITION.

1. The question involved in the present case is of the utmost importance and is one of general interest. It not only involves the several hundred thousand dollars in revenue directly connected with this action but between three and four million dollars in other cases now actually pending before the Commissioner of Internal Revenue, and it vitally affects the right of the United States to collect the full amount of estate taxes that will become due from executors of all future estates where the testator leaves his residuary estate to institutions such as are mentioned in Section 403 (a) (3) of the Revenue Act of 1918, and Section 403 (a) (3) of the Revenue Act of 1921.

2. The Circuit Court of Appeals erred in holding that the amount of a residuary estate can be determined or the fact established that such an estate exists at all before all paramount charges are deducted.

3. The decision of the Circuit Court of Appeals in effect holds that where a testator leaves his residuary estate to charity and after the payment of paramount charges and general legacies it becomes apparent that there will be no residue there may nevertheless be deducted from the statutory gross estate an amount which, because of such paramount charges, neither in law nor in fact was or could be given to the residuary legatee.

It is submitted that the petition should be granted.

JAMES M. BECK,
Solicitor General.

The executors of Mrs. Sage were not entitled under the provisions of section 403 (a) (3) of the Revenue Act of 1918 to take, as a part of the deduction from the statutory gross estate by reason of the gifts to charity, any amounts which the testatrix did not in law or in fact give or the charities actually receive.

The respondents contend that the amount of the deduction from gross estate by reason of the residuary gifts to charity should not be diminished by the federal estate tax.

The petitioner contends that the amount of the residuary gifts to charity could not be determined until after the federal estate tax had been computed and subtracted.

Since the testatrix gave her entire residuary estate to charity and since under Section 403 (a) (3) of the Revenue Act of 1918 a deduction from the statutory gross estate of the amount of all gifts to charity was permitted in order to determine the statutory net estate, the particular question in the case at bar is to determine the "amount of" the residuary gifts to charity. The federal estate tax is paid from and always in fact diminishes the residuary estate. *Matter of Hamlin*, 226 N. Y. 407. Section 203 of the Revenue Act of September 8, 1916, provides in part as follows:

> That for the purpose of the tax the value of the net estate shall be determined—
>
> (a) In the case of a resident by deducting from the value of the gross estate—

certain items which are specified in that section into which must be read the retroactive provision contained in Section 403 (a) (3) of the Revenue Act of 1918. It will thus be seen that the term "net estate" is a purely statutory conception and that "net estate" as defined by the law now under consideration can only be arrived at by following precisely the directions of the statute. Since to calculate the net estate in the case at bar it becomes necessary to deduct the "amount of" the residuary estate, the question is reduced to a determination of what is the residuary estate. That the amount of the residuary estate is what is left after the subtraction of all paramount claims is not open to question.

> *Morgan* v. *Huggins*, 48 Fed. Rep. 3, 5;
> *Plunkett* v. *Old Colony Trust Co.*, 124 N. E. 265, 267;
> *Matter of Hamlin*, 226 N. Y. 407;
> *In re Lord's Estate*, 183 N. Y. Sup. 132;
> *Matter of Witteman's Estate*, 176 N. Y. Sup. 559;
> *People* v. *Pasfield*, 120 N. E. 286;
> *In re Inman's Estate*, 199 Pac. 615;
> *Old Colony Trust Co.* v. *Burrell*, 131 N. E. 321.

The residue has also been defined as—

> What is left after all liabilities are discharged and all the objects of the testator are carried into effect.
> *Morgan* v. *Huggins*, 48 Fed. 3, at page 5.

In defining the residue in the case of an estate subject to the Federal estate tax the court said in

Plunkett v. *Old Colony T. Co.*, 233 Mass. 471, at pages 475 to 476:

> It is the general rule that, failing any testamentary provision to the contrary, debts, charges, and all just obligations upon an estate must be paid out of the residue of an estate. The benefaction conferred by the residuary clause of a will is only of that which remains after all paramount claims upon the estate of the testator are satisfied. *Tomlinson* v. *Bury*, 145 Mass. 346. The tax is a pecuniary burden or imposition laid upon the estate. *Boston* v. *Turner*, 201 Mass. 109–193. In its nature it is superior to the claims of the residuary legatee. Since neither the act of Congress nor the will and codicils make any other provision for the point of ultimate incidence of this tax, it must rest on the residue of the estate. *Matter of Hamlin*, 226 N. Y. 407, 418, 419.

It is this amount and this amount only which under the statute is deductible from the gross estate in the case at bar. The residue as originally computed by Mrs. Sage's executors is what is left after the fixed legacies, debts, and the administration expenses are paid but before the federal estate tax is paid—a tax which is prior to all charges except possibly administration expenses. The federal estate tax is not more a part of the residue than are the funeral expenses, executor's fees, attorney's fees, or debts.

The fallacy of contending that the federal estate tax must not be subtracted in ascertaining the amount

of the residue left to charities is made evident if we suppose a case where the residuary estate without diminution by reason of the federal tax equalled $100,000 and the tax equalled or exceeded the residue, the residuary legatee or legatees would receive nothing, *yet under the decision of the Circuit Court of Appeals a deduction from the statutory gross estate amounting to $100,000 would nevertheless be taken—a deduction with a wholly fictitious basis and allowed only because a testatrix provided that if anything were left the charities should get it.*

The purpose of Section 403 (a) (3) of the Revenue Act of 1918 is to provide for a deduction from the statutory gross estate and not for an exemption to any particular class of beneficiaries.

Some misapprehension has existed in regard to the purpose of the provisions of Section 403 (a) (3) now under discussion. The section provides for a *deduction,—not an exemption.* As many times decided, the estate tax law is not a tax on the transfer of the interests of the several legatees but a tax on the estate as a whole. This is the view adopted by the highest court of the State, in which Mrs. Sage's estate was administered. *Matter of Hamlin*, 226 N. Y. 407 (124 N. E. 4). The provisions of the act itself suffice to show that such is the scheme of the law. In *Matter of Hamlin*, supra, it was said (page 7):

> To hold that the Congress by the language of the sections referred to intended by implication to provide that the tax imposed by the act was one upon legacies, the tax to be paid

by legatees, would not only violate the c
expressed intention of the Congress bu
quire us to ignore the historical facts sur-
rounding consideration of the measure by the
Congress.

That there is no purpose to exempt charities may best be illustrated by assuming a case in which a testator gives a legacy of $100,000 to an individual and another legacy of $100,000 to a charity. If we assume that the federal estate tax is so large that the residuary estate is not sufficient to meet it, resulting in a necessary abatement of general legacies, it is clear that both the legacy to the individual and the legacy to charity will abate proportionately. They abate by reason of the fact that the federal estate tax has more than exhausted the residue, but the abatement is equal. No intention can be found in the law to favor one class of beneficiaries as against another in bearing the burden of the tax. That burden, it is clear, must fall on the residuary legatee, whether such residuary legatee be a charity or an individual.

Wherever the requirements of the law can be complied with only by the application of mathematics such use is proper, as courts have always taken judicial notice of the science of mathematics and have never hesitated to apply its principles where it has become necessary to use them.

Due to the fact that the entire residuary estate was deductible from the gross estate and that the true residuary estate could not be ascertained until the tax was ascertained, the amount of that tax being

dependent on the net estate, the Commissioner of Internal Revenue was confronted with the situation in which two unknown quantities existed, and in order that the problem might be solved found it necessary to resort to a mathematical calculation. The court below deals with this calculation by saying that "algebraic formulæ are not lightly to be imputed to legislators." The use of the mathematical calculation by the Commissioner appears, therefore, to have influenced the Circuit Court of Appeals in arriving at a conclusion in regard to the meaning of the term "residuary estate." It is submitted that it is not necessary to impute to Congress any intention one way or the other in respect to the methods by which the rules laid down in the estate tax law are to be administered, but wherever it becomes necessary to make use of mathematics courts have not hesitated to apply such principles.

Scanlan v. *San Francisco R. Co.*, 55 Pac. 694;

Wyldes v. *Patterson*, 153 N. W. 630;

St. Louis S. W. R. Co., v. *Ellenwood*, 185 S. W. 768;

Simpson v. *U. S.*, 252 U. S. 547.

It has been many times held by the courts that the science of mathematics is a proper subject for judicial notice, and calculations based on various branches of this science have been frequently employed and their use judicially justified. In the case of *Wyldes* v. *Patterson, supra*, a mathematical calculation was used to show that the testimony of a certain witness must

have been false. The court, by Bruce, J., stated, page 633:

> It seems hardly necessary in this age of universal education to go further into details, but counsel for appellant appears to so strenuously favor guesswork as a right and rule of law as opposed to mathematical truths, and to so scrupulously refuse to enter into any mathematical computation himself, that it seems necessary that the figures should be given.

The court then sets forth in its opinion a mathematical formula by which it is shown that the testimony of the witness in question must have been erroneous or false and concluded its consideration of the use of the mathematical formula with the following observation:

> Counsel, we know, seeks to discredit these plain mathematical truths and the value of mathematical computation by stating that there is a discrepancy between the results of the State engineer and those given in the former opinion. If this were so, it would have been an easy thing for counsel and the Trial Judge to have figured out the true solution.

In *Scanlan* v. *San Francisco R. Co.*, supra, the court stated, by Van Fleet, J., page 695:

> The court takes judicial notice of the laws of nature, * * * among which are the principles of mathematics. The science of mensuration, which must control in this case, is a branch of pure mathematics, with which the court is presumed to be acquainted.

Courts have also frequently authorized the use of mortality tables. In *Simpson* v. *U. S.*, 252 U. S. 547, in referring to the use of such tables this court said, by Mr. Justice Clark (page 550):

> The objection is not to the particular table that was used but to the use of any such table at all—to the method. Such tables, indeed the precise table which was made the basis of the one used by the collector, had been resorted to for many years prior to 1899 by courts, legislatures, and insurance companies for the purpose of determining the present value of future contingent interest in property and we take judicial notice of the fact that at the time this tax was collected 4 per cent was very generally assumed to be the fair value or earning power of money safely invested. Both the method and the rate adopted in this case have been assumed by this court, without discussion, as proper in computing the amount of taxes to be collected under this War Revenue Act in *Knowlton* v. *Moore*, 178 U. S. 41, 44, 20 Sup. Ct. 747, 44 L. Ed. 969; *United States* v. *Fidelity Trust Co.*, 222 U. S. 158, 32 Sup. Ct. 59, 56 L. Ed. 137; *Rand et al* v. *United States*, 249 U. S. 503, 506, 39 Sup. Ct. 359, 63 L. Ed. 731, and in *Henry, Executor*, v. *United States*, 251 U. S. 393, 40 Sup. Ct. 185, 64 L. Ed., decided at this term. It is much too late to successfully assail a method so generally applied, and as to this claim of error the judgment of the Court of Claims is affirmed.

We think the authorities cited above sufficient to establish the fact that the Commissioner of Internal Revenue has, wherever it becomes necessary to do so, the right to make use of whatever branch of mathematical science is applicable to the case under consideration. There is nothing unusual about the calculation involved in this case. It may properly be classified with the formulae and calculations referred to in the various decisions cited.

Petitioner desires to reiterate that the paramount question for determination is what is the true residuary estate of the testatrix.

CONCLUSION.

The courts below fell into error in the following particulars:

1. In holding that there could be a residuary estate until all paramount charges had been paid, including the federal estate tax.

2. In assuming that any different method of computing the amount of the residuary estate is adopted where charities are involved than would be made use of where the residuary estate is left to individuals.

3. In failing to recognize that the operation of the federal estate tax must vary in accordance with the laws of the different States.

4. In failing to recognize that the term "net estate" as used in the federal estate tax law is a purely statutory conception.

5. In failing to recognize that Section 403 (a) (3) of the Revenue Act of 1918 provided for a deduction and not an exemption.

It is respectfully submitted that the writ of certiorari should be issued as prayed.

JAMES M. BECK,
Solicitor General.

April, 1923.

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No. ~~277~~

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1922.

WILLIAM H. EDWARDS, FORMERLY COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF NEW YORK,

Petitioner,

v.

JOSEPH JERMAIN SLOCUM, HERBERT JERMAIN SLOCUM, STEPHEN L'HOMMEDIEU SLOCUM, ROBERT W. DE FOREST, AND HENRY W. DE FOREST, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF MARGARET OLIVIA SAGE, DECEASED,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The Evening Post Job Printing Office, Inc., 156 Fulton St., New York, N. Y.

No.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1922.

WILLIAM H. EDWARDS, formerly Collector of Internal Revenue for the Second District of New York,

Petitioner,

v.

JOSEPH JERMAIN SLOCUM, HERBERT JERMAIN SLOCUM, STEPHEN L'HOMMEDIEU SLOCUM, ROBERT W. DE FOREST and HENRY W. DE FOREST, as Executors of the Last Will and Testament of Margaret Olivia Sage, Deceased,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The respondents' testatrix died on November 4, 1918. She left some general legacies to charitable institutions, and in addition gave her entire residuary estate to some thirty-five charitable, religious and educational institutions.

The question at issue in this case is how the Federal Estate Tax shall be determined, in view of the fact that charitable legacies (which under the statute are not taxable) constitute the residuary estate.

In brief, the Executors' contention is that the statute imposes a tax on so much of the estate (over and above debts and expenses) as passes to persons other than to charities and other exempt legatees.

The Government's position is that not merely that amount is to be taxed, but, in addition thereto, the Federal Estate Tax is to be levied upon the amount necessary to pay the Federal Estate Tax itself. The Government would apply this consistently, so that the Federal Estate Tax keeps increasing, as in the computation in each case it is to be imposed upon itself, with the result that there is created a series prolonged to infinity. The Government was, thus, forced to have its mathematicians create a formula to determine the result of this infinite series.

The Executors computed the tax on what appeared to be the evident and clear meaning of the law. The gross estate amounted to $49,100,000 (the figures used here are approximate). Debts and administration expenses amounted to $3,800,000. Therefore, if there had

been no charitable gifts, the amount taxable would have been $45,300,000. The general legacies amounted to approximately $9,900,000, leaving a residue (bequeathed to charities) of approximately $35,400,000. In view of the provisions for the exemption of charitable legacies, the Executors deducted from $45,300,000 the residue of $35,400,000 (and also some general legacies to charities). The balance is the amount which they returned as subject to tax, and paid thereon a tax of approximately $1,400,000.

The Government's contention is that not all of the residuary estate will go to charities, because the Federal Estate Tax will have to be paid out of it; and, therefore, the amount which can be deducted under the statute is only so much of the residuary estate as is left after the tax has been paid out of it. But, as the charitable deduction is necessary to the determination of the tax, and, as under the Government's theory, the tax is necessary to the determination of the charitable deduction, there arose a situation in which there were two indeterminates. Ordinary arithmetic cannot grapple with such a situation, and the Government thereupon produced an algebraic formula.

The formula which the Government mathematicians evolved and used in this case is the following:

EXPLANATION OF TERMS USED.

G = Gross estate
N = Net estate
R = Residue
T = Federal Estate Tax
D = Known deductions } When taken together known as A
E = Specific deductions }
S = Property specifically disposed of (this includes specific bequests, transfers, debts, funeral and administration expenses and State Inheritance Taxes)
K = Total tax on all blocks up to the last one used
B = Total of blocks the tax on which is represented by K
% = Rate of tax on the last block

FORMULA

$$G = R + S + T$$

(1) $R = G - S - T$

$$T = K + \% (N - B)$$
$$T = K + \% N - \% B$$
$$T = K + \% [G - (A + R)] - \% B$$
$$T = K + \% G - \% (A + R) - \% B$$
$$T = K + \% G - \% A - \% R - \% B$$

Substituting in (1)

$$R = G - S - (K + \% G - \% A - \% R - \% B$$
$$R = G - S - K - \% G + \% A + \% R + \% B$$
$$R - \% R = G - S - K - \% G + \% A + \% B$$

The result of the application of this formula is to increase the tax to approximately $1,840,000. The Executors paid the additional amount under protest and sued to recover it. The Government

moved to dismiss the complaint for failure to state a cause of action. The motion was denied, and the Government electing to stand on its motion, judgment was entered for the Executors. The Government appealed to the Circuit Court of Appeals which unanimously affirmed the judgment.

I.

It is fundamental in the law of taxation that a tax is imposed without regard to its own incidence. Thus, it is an every-day occurrence that inheritance taxes are imposed upon an estate before the amount of the estate taxes are deducted from it. A Government does not undertake to ascertain how much of the estate will be left after the estate taxes are paid and then tax only that remainder.

Where the Government undertakes to determine the amount of an estate in order to tax it, it insists that the amount of the tax to be imposed should not be considered. In determining the amount of an estate, the taxing authority closes its eyes to that which it itself takes out of the estate by way of tax, and values the estate as though it, itself, took nothing from it.

Consistently, the same view must be taken when we are computing the value for the purpose

of exempting it, as when we were computing the value for the purpose of taxing it.

If a tax were being imposed upon the residuary estate, its amount would be determined without deducting from it the tax itself. Obviously, when the amount of the residuary estate is to be determined, not for the purpose of taxing it but for the purpose of exempting it, the same rule must be applied. The expression "amount of the legacy" must have the same meaning, whether it be used to state the amount to be taxed or the amount not be taxed.

The Government strenuously asserts that, in determining the amount to be taxed, we must entirely disregard the incidence of the tax, *i. e.*, that we must ignore the fact that the amount received by the legatees will be reduced by the amount of the tax; but it now seeks to assert that, in determining the amount not to be taxed, the incidence of the tax should be regarded, *i. e.*, that we should take into account the fact that the amount to be received will be reduced by the amount of the tax. There is obviously no basis in logic or in reason for the distinction. The Government's claim in this case so clearly violates fundamental principle, and is so unfair that the lower courts unanimously and promptly overruled it.

II.

The Government, in order to apply its theory of the construction of the law, has found it necessary to evolve the complex formula which we have set forth. Its argument that a Court may use mathematics or take judicial knowledge of mathematical principles, is wholly beside the point.

On the occasion of the Civil War and the Spanish-American War, Congress passed acts of a considerable degree of complexity, taxing inheritances. When it came to the late War, Congress, after careful consideration, abandoned the former more elaborate taxation of inheritances, and, instead, imposed the simple estate tax which we now have. It is short, and apparently provides for a tax easy of computation. It imposes upon the Executors the duties of filing a return under oath, setting forth the value of the estate and the tax payable thereon.

It is certainly unreasonable to assume that Congress intended that, in order to determine the tax under this statute, there must be employed a method, such as proposed by the Government, which involved an algebraic formula of such complexity that it cannot be evolved by anyone except an expert skilled in higher mathematics. On the

other hand the method employed by the Executors in computing the tax was the simple, obvious and customary method of computing such taxes, and carried out the evident purpose and intent of Congress.

We thus claimed (and the Courts below agreed with us) that a clear, just and readily workable construction of the statute, calling for a simple and customary computation, should not be laid aside in favor of a subtle construction involving a complicated algebraic computation.

The Courts below did not hold, and it is not our contention, that Courts may not apply the principles of mathematics. The point was: Of these two constructions, which should the Court adopt; and the Circuit Court of Appeals held that, of the two methods, "the presumption is that Congress intended a simpler method—one that the plain man could understand. Algebraic formulæ are not lightly to be imputed to Legislators".

III.

The theory of construction presented by the Government involves numerous other difficulties, some of which were pointed out in the opinions of the Courts below.

Admittedly, this rule is applicable only when there is a residuary gift to charity, and can never

have any effect other than to decrease the amount which will pass to charities. In view of the policy of Congress to exempt charities from the burden of the Estate tax (in keeping with its general policy of the exemption of charities from war taxes), a Court will not adopt an interpretation of the statute which can have no other possible application than to impose an additional burden upon charities unless the language plainly requires it. Certainly that is not true of the interpretation which the Government suggests; on the contrary the Government labors painfully in its endeavor to bring its interpretation within the language of the statute.

The construction contended for by the Government has the further difficulty of not being susceptible of uniform application throughout the United States. It would, in every instance, be necessary to look into the rule of the local Probate Court as to how it treats the Federal Estate Tax for the purpose of adjusting the rights between the beneficiaries. Where the Probate Court holds that the Federal Estate Tax is borne by the legatees ratably, then the rule cannot be applied, and the tax would have to be computed in the method for which the Executors here contend. Certainly a Court should be loath to adopt a construction of a Federal tax statute which will change its application in the various States, depending upon the local law.

The application of the Government's theory would set up a wholly artificial amount as the basis upon which the tax would be computed. This amount would be the sum of the legacies to non-exempt legatees plus the amount of the Federal Estate Tax. No argument is advanced, in reason or in logic, why such a figure should be selected as the amount for the imposition of the Federal Estate Tax. It is not the amount which passes to the tax-exempt legatees or to anybody; it is not the amount of the net estate; it is purely an arbitrary figure which results from the strained argument of the Government. The Government suggests no reason why Congress should have selected so curious an amount as the basis for the computation of the estate tax—and only in those instances where a charity is the residuary legatee.

The Government does not discuss the policy of the statute, or the logic or fairness of the construction for which it argues or of the result which it would achieve. On all of these considerations, the argument is wholly with the respondents.

IV.

The question presented is essentially simple. The District Judge, and all three Judges in the Circuit Court of Appeals, had no difficulty in disposing of it in the same way. The only appearance of complexity given to the case is caused by the labored argument of the Government to create a wholly unjust, complicated and illogical exception to well-recognized principles. They present no authority or precedent to support the imposition of a tax such as they here seek to sustain.

The Circuit Court of Appeals has thus well summarized the case:

> "that the scheme of taxation insisted on by the plaintiff-in-error is unjust, opposed to long-established practice and the spirit of the statute, that it is not required by the language of the act, and tends to confusion, taken the country over".

We respectfully submit that the Government contentions raise no question justifying review by this Court and the writ should be denied.

Respectfully submitted,

ROBERT THORNE,
Attorney and of Counsel for
Respondents-Executors of
the Will of Margaret Olivia
Sage.

No. 276.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1923.

WILLIAM H. EDWARDS, FORMER COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF NEW YORK,
Petitioner,

against

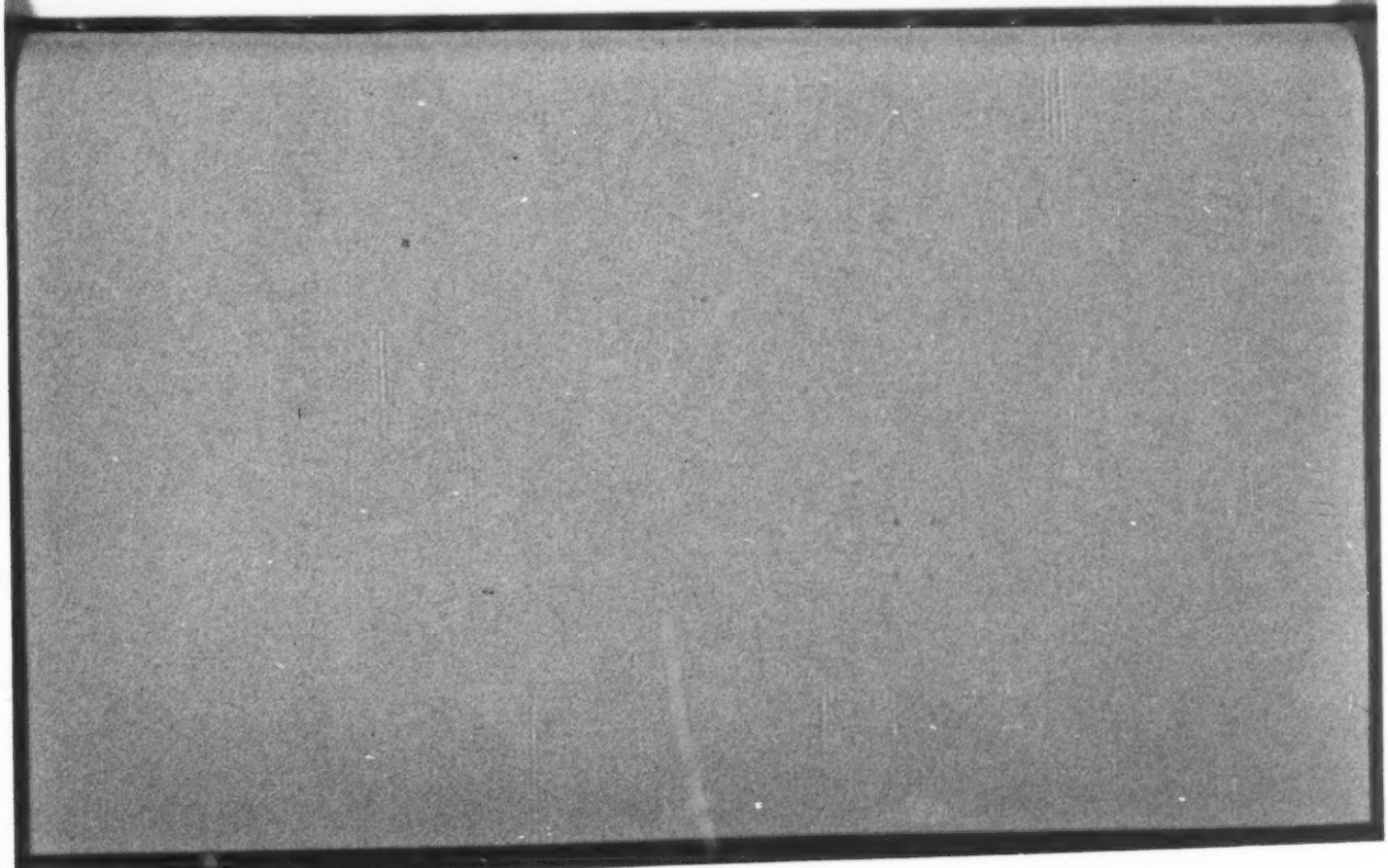
JOSEPH JERMAIN SLOCUM, *et al.*, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF MARGARET OLIVIA SAGE, DECEASED,
Respondents.

BRIEF FOR THE EXECUTORS OF THE ESTATE OF JOSEPH R. DELAMAR, DECEASED, AS AMICI CURIÆ IN SUPPORT OF AFFIRMANCE OF JUDGMENT OF THE CIRCUIT COURT OF APPEALS.

SULLIVAN & CROMWELL,
Attorneys for Executors of the Estate of JOSEPH R. DELAMAR, deceased.

HARLAN F. STONE,
EDWARD H. GREEN,
Of Counsel.

The Evening Post Job Printing Office, Inc., 184 Fulton St., New York, N. Y.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1923.

WILLIAM H. EDWARDS, former Collector of Internal Revenue for the Second District of New York,
Petitioner,

AGAINST

JOSEPH JERMAIN SLOCUM, HERBERT JERMAIN SLOCUM, STEPHEN L'HOMMEDIEU SLOCUM, ROBERT W. DEFOREST and HENRY W. DEFOREST, as Executors of the Last Will and Testament of MARGARET OLIVIA SAGE, deceased,
Respondents.

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE EXECUTORS OF THE ESTATE OF JOSEPH R. DeLAMAR, DECEASED, AS *AMICI CURIAE* IN SUPPORT OF AFFIRMANCE OF JUDGMENT OF THE CIRCUIT COURT OF APPEALS.

The Executors of the Estate of Joseph R. DeLamar, deceased, request leave to file this brief in support of the judgment of the Circuit Court of Appeals and in opposition

to the petition of the Government for a writ of certiorari to reverse that judgment. The testator, Joseph R. DeLamar, died December 1, 1918, leaving his entire residuary estate to Harvard, Columbia and Johns Hopkins Universities, so that there exists in that estate the same question as is raised in the case at bar with respect to the Estate of Mrs. Sage.

The facts are fully set forth in the opening statement in the brief of the petitioner as supplemented by the statement in the brief of the respondents, so that we need make no further preliminary statement.

The question at issue in this case is how the Federal Estate Tax shall be determined when the charitable legacies (which under the statute are not taxable) constitute the residuary estate. The Executors contend that the statute imposes a tax only on so much of the estate (over and above debts and expenses) as passes to persons other than exempt charities. The Government's position is that, in addition thereto, the Federal Estate Tax is to be levied upon the amount necessary to pay the Federal Estate Tax itself. Or, in other words, that the residuary gift to charity must be diminished by the amount of the Federal Estate Tax, and only the balance constitutes a charitable deduction under the statute. Under the Government's theory, the charitable deduction cannot be determined until the amount of the tax is fixed; and as under the statute the charitable deduction must be determined before the tax can be fixed, we have an equation with two indeterminates. The tax can be determined under the Government's theory only by the aid of a complicated formula that will solve such an equation; such a formula was evolved by the Government mathematicians and employed in this case.

ARGUMENT.

I.

It is fundamental that a tax is imposed without regard to its own incidence, unless the statute otherwise expressly provides. The claim of the Government requires the direct negation of this principle.

It is fundamental in the law of taxation that a tax is imposed without regard to its own incidence. Taxing statutes levy their impost upon their subject-matter without allowance for the tax which they impose. The tax collector does not regard what will be left after he has collected his tax, but what was there before his exaction.

We have the best illustration of this in the administration of the Federal Estate Tax itself. The Government not only admits, but strenuously insists, that in determining the amount of an estate to be taxed, the amount of the tax itself must not be considered; the Government closes its eyes to what the beneficiaries actually receive, and regards only what the decedent left. The Government, in accordance with the correct and universally recognized principles of taxation, does not permit the basis of the tax to be diminished by the tax itself, nor does it take the tax into account in computing the tax.

The correctness of this rule was clearly raised and decided by the Court of Appeals in the State of New York in an opinion by Judge Gray, *Matter of Estate of Swift*, 137 N. Y. 77:

> "Another question, which I shall merely advert to in conclusion, arises upon a ruling of the surrogate with respect to appraisement, in connection with a clause of the will directing that the amount of the tax upon the legacies and devises should be paid as an expense of administration. The appraiser, in

ascertaining the value of the residuary estate for the purpose of taxation, deducted the amount of the tax to be assessed on prior legacies. The surrogate overruled him in this, and held that *there should be no deduction from the value of the residuary estate of the amount of the tax to be assessed, either upon prior legacies, [illegible]on its value.* He held that the legacies taxable should be reported, irrespective of the provision of the will; and that a mode of payment of the succession tax prescribed by will is something with which the statute is not concerned. *I am satisfield with his reasoning and can add nothing to its force. Manifestly, under the law that which is to be reported by the appraiser for the purpose of the tax is the value of the interest passing to the legatee under the will, without any deduction for any purpose, or under any testamentary direction.*" (Italics ours.)

In *Matter of Swift,* there was even an express provision in the will that taxes should come out of the residuary estate; in the case at bar, there was no such provision in the will, but it followed as a matter of New York law (*Matter of Hamlin,* 226 N. Y. 407).

The Government would universally apply the rule of imposing taxes without regard to their own incidence, except in one case, namely, where the residuary estate (or a part of it) goes to charity; and in that single instance it would apply the antithetical rule, to the end that it will collect a larger tax, which must be borne by the charities. The Government correctly claims (and it is clearly-settled law) that in determining the amount of a legacy or an estate for the purpose of imposing a tax on it, the computation is made wholly without deduction for the tax itself and without consideration of the amount that the beneficiary will receive after the tax is paid. Surely, then, when the statute carves out of the amount of the estate to be taxed *"the amount of legacies to charities"* in order not to tax that amount, Congress

was not talking in two different senses. When the "amount of the legacy" is excluded from the whole estate in order to be exempted from the tax, it must be given the same meaning as was ascribed to it when it was included in the estate for the purpose of tax. The expression "amount of the legacy" must have the same meaning whether it be used to state the amount to be taxed or the amount not to be taxed.

If the Revenue Law imposed a tax at two rates, viz., at rate A on all the estate except on certain legacies which were to be taxed at rate B, there is no question but that the amounts to be taxed at either rate would be determined without regard to the incidence of the tax itself. It can make no difference if rate B is smaller than A; or even if it should be reduced to zero; and that is what Congress, in effect, has done with respect to the amount of legacies to charity. Likewise, it can make no difference that we are dealing with a residuary estate. If the tax were being imposed upon a residuary estate, its amount would be determined without deducting from it the tax itself. Similarly, when the amount of the residuary estate is to be determined for the purpose of treating it differently from the rest of the estate, *i. e.*, taxing it at a different rate, it will be determined without regard to the incidence of the tax. No other rule can be applied when that different rate is a smaller one, even if it be zero.

If a man left $100,000 to charity and the residuary estate to his wife, the Government would disregard what the wife actually received, and would tax the entire estate less $100,000, regardless of the tax. If we have the converse, namely, that a man leaves $100,000 to his wife and the residue of his estate to charity, we say inevitably the statute must similarly be applied. There is now no more reason than before for regarding the tax itself. There is no reason for determining the residuary estate in this illustration in any way other than it was determined in the prior one.

To push it a step farther, let us assume that a man left half of his estate to his wife and the other half of his estate to charity. Then, according to the Government's contention, in considering the taxable half that goes to the wife, the Federal Estate Tax must be ignored and we have no concern with what she actually receives; but in considering the exempt half which goes to charity, we must deduct the Federal Estate Tax and we must regard what the charities actually receive. In other words, a half is not a half if it is to be exempted instead of being taxed.

In the District Court, Judge Augustus N. Hand in deciding this case, expressed it thus:

> "In the case of an estate bequeathed to a single individual, the estate tax might have been computed upon what he would receive after the estate had suffered diminution by the tax itself but such has never been the practice, and the uniform theory has been that the estate passing was to be treated without regard to the incidence of the tax itself. I see no reason why a different rule should be adopted in dealing with the words 'the amount of all bequests, legacies, devises or gifts' even when applied to a residue to charity. In the first case, if the taxes had been computed upon the amount actually passing after deducting the tax, millions of dollars would have been saved to taxpayers. It does not seem consistent to look at the matter in a different way in dealing with the present case, particularly in view of the liberal legislation enacted in aid of charitable gifts."

In the Circuit Court of Appeals, Judge Hough said:

> "As Holmes, *J.*, remarked in the New York Trust Company Case (256 U. S. 345), 'Upon this point a page of history is worth a volume of logic'. History, so far as we can discover, shows no other instance of attempting to measure a tax pro tanto by itself."

But the Government invokes neither logic nor history. It cites not a single precedent nor any instance in the history of taxation in which a tax has been imposed by the method for which it here argues.

It is interesting and instructive to note that this theory is one of very recent origin even with the Government itself. Thus, in *Dugan* v. *Miles*, 276 Fed. 401, the facts were legally the same as those in the case at bar. Judge Rose applied the statute in the manner for which the Executors here contend, apparently without the suggestion of any other method to be considered. On appeal, one part of his decision was reversed, but on this point the Circuit Court of Appeals (for the ~~Third~~ Fourth Circuit) followed Judge Rose, although the case was there on cross-writs of error (292 Fed. 131).

Nor does the Government consider the public policy involved in the statute. We do not ask for any favored treatment for charities. We simply ask to have the amount of the gifts to charity determined in the same way that the amount of any other gift is determined. Surely, that is not too much to ask, when we note that in the entire Revenue Act of 1918, not only in the Estate Tax Title but throughout all the taxes imposed thereby, the declared policy is to favor charities and exempt them from the burden of the taxes therein imposed. The Federal Courts have held that such provisions in favor of charities should be broadly construed in conformity with the spirit of the Act (for example, see *Lederer* v. *Stockton*, 260 U. S. 3). But the Government seeks the exact opposite. It seeks to make an exception to the universal rule that taxes are to be imposed without regard to their incidence, which exception shall apply only in that single instance where its application will impose a greater burden of taxation upon charities.

II.

A consideration of the statute itself shows the Government to be in error.

It is settled that the Federal Estate Tax is "a tax on the right to transmit or on the transmission at its beginning" (*New York Trust Company* v. *Eisner*, 256 U. S. 345). It is not a tax on the right to receive. The statute now under consideration was originally enacted in 1916, and immediately received that construction by the Government in the first Regulations issued by it (Regulations No. 37); and it was thus enforced. The statute by its very terms looked only to what passed from the decedent. It did not look to what the beneficiaries received; and the tax was imposed on the estate without diminution by the tax itself.

The statute, as originally enacted, contained no reference to charitable legacies. Congress by an amendment adopted February 24, 1919, provided that there should be deducted "the amount of all bequests, legacies, devises or gifts" to charities. If Congress had meant that this clause inserted by this amendment should be treated differently than the rest of the statute, it would certainly have used appropriate language to that end. The existing statute, both by its language and by its administration, looked only to the property of the decedent when he died and disregarded the property which the beneficiaries received. We would expect Congress to make this inserted provision consistent with the whole theory of the law, and it would take express language to indicate a contrary intent; but here we find that Congress has actually used appropriate language to keep this clause consistent with the rest of the Act.

If Congress had intended to reach the result contended for by the Government, then in the statute which

dealt solely with the property of the decedent when he died, and "the transmission at its beginning", Congress would have inserted as the charitable exemption some expression to show that it had departed from the theory of the rest of the act and was here regarding only the ultimate sum finally received by the legatee.

In *Knowlton* v. *Moore*, 178 U. S. 41, this Court pointed out that the construction of the Spanish American War Inheritance Tax statute urged upon it by the Government, was caused by a confusion that "arises from not keeping in mind the distinction between the tax on the interest to which some person succeeds on the death and a tax on the interest which ceased by reason of the death, the two being different objects of taxation".

That very same confusion gives rise to the Government's contention in this case. It construes the statute as a whole as "a tax on the interest which ceased by reason of the death", and then endeavors to take this one clause and construe it as though the statute imposed "a tax on the interest to which some person succeeds on the death". The principle of consistent construction of the statute negatives the Government's claim.

In other ways, also, it is apparent from the statute itself that the Government's contention is untenable. The Statute itself provides the method of computing the tax in direct and unequivocal language. The tax is assessed upon the value of the net estate which is determined by making certain specified deductions from the gross estate, among which are included the "amount of all bequests, legacies", etc. to charity. The language is specific. The tax is determined by making the specified deductions; a plain, simple, direct and understandable method of tax computation. The Government, however, contends that the amount to be deducted must be preceded or accompanied by the ascertainment of the tax; a procedure which is not suggested by either the form

or the substance of the Statute. The amount of the charitable deduction is necessary to a determination of the tax, because until that is determined we do not get to the net estate upon which the tax is based. Thus according to the claim of the Government, the amount of the charitable deduction cannot be determined until the amount of the tax is determined.

Under the Government's theory, as the charitable deduction is necessary to the determination of the tax, and the tax is necessary to the charitable deduction, there arises an equation with two indeterminates, and the statute can only be applied through the solution of such an equation. With that situation, ordinary mathematics cannot grapple, and the Government was compelled to call upon its mathematicians to evolve the elaborate formulæ embodied in the complaint and in the foot-note to the opinion of the Circuit Court of Appeals.

Counsel for the Government wholly ignores this formulæ in his brief. But surely an argument must be tested by the result which it produces.

On the occasion of the Civil War and of the Spanish-American War, Congress passed Acts of a considerable degree of complexity, taxing inheritances. When it came to the late War, Congress, after careful consideration, abandoned the former more elaborate taxation of inheritances, and, instead, imposed the simple Estate Tax which we now have. It is short, and apparently provides for a tax easy of computation. It imposes upon the Executors the duty of filing a return under oath setting forth the various items called for by the statute and the tax payable.

Nothing can be found in the statute to give rise to the assumption that Congress intended that, in order to compute the tax which it thereby imposed, a resort must be had to formulæ of such complexity that they could be evolved only by those skilled in higher mathematics. As

opposed thereto, the method employed by the Executors in computing the tax was the simple, obvious and customary method of computing such taxes, and carried out the evident purpose and intent of Congress.

We contend that neither the language of the Act nor its evident purpose or intent shows that Congress meant to adopt a method for the computation of the tax wholly new in the history of taxation—and new, not because of its progress towards simplicity; but new, because of its extreme complexity. We contend that, on the contrary, the statute in its every part shows that Congress intended that the tax should be computed in the simple, customary method.

We do not admit that the Government's construction is a possible one under the statute; but even if it were, of the two possible constructions, every principle requires the adoption of the one which the Executors have used. The Circuit Court of Appeals has understated, rather than overstated the situation when it said:

> "the presumption is that Congress intended a simpler method—one that the plain man could understand. Algebraic formulæ are not lightly to be imputed to legislators".

III.

The application of the Government's theory produces certain results which clearly indicate its error.

The logical application of the Government's theory requires that there be deducted from charitable legacies not only the Federal estate tax but also the various State taxes. The Government's contention is that the statute means that there shall be deducted only so much as the charity actually receives. There is no stopping place be-

tween that claim and the claim advanced by the executors. If we are to look at what the charity has actually received, then there is no possible distinction between the Federal estate tax and the State taxes (whether inheritance or estate). Both actually and in the same way reduce the amount that the charity receives.

The Government originally was logical and took that view; but its absurdity in operation became so evident that the Government felt the need of amending its claim so as to assert that only the Federal tax is to be deducted and not the State tax. That resulted in the Government confessing error to the extent of $112,172.17 as referred to in the statement of fact. The Government's theory logically applied produced the result that the more the State taxed a charity, the more the Federal Government would tax it; and the Federal estate tax would not increase in proportion to the State tax but at a higher rate because the Federal tax would be imposed not only upon the State tax but also upon the amount of the Federal tax itself imposed on the State tax. Thus, a legacy which Congress said should not be taxed, would be taxed for no other reason than that a State taxed it.

Accordingly, the Government was compelled to abandon consideration of State taxes. But the moment that it did so it was compelled to abandon its theory that Congress intended only to look to what the charities actually receive. The Government thus is without any logical position whatsoever. The same logic and reasons that compelled it to modify its rule by not deducting State taxes from the charitable legacies must compel it to abandon that rule completely and not deduct Federal taxes.

The Government is faced with the further difficulty that the rule for which it contends will produce a situation whereby the Federal estate tax will not be susceptible of uniform application throughout the United States. It so happens that the New York courts have decided that

the Federal estate tax shall be borne by the residuary legatee (*Matter of Hamlin, supra*). But if the decedent were a resident of a State which held that the Federal estate tax should be borne ratably by the legatees, then the Government's formula would not be applicable. In every case, it would be necessary to look to the decisions of the local Probate Court to see its determination with respect to the incidence of the Federal estate tax and the amount of the Federal estate tax would depend upon the local rule as to its incidence. The Government's construction of the Federal statute will change its application in the various States, depending upon local law, and this Court will be loath to adopt such a construction of a national tax law.

IV.

The Government's argument, as set forth in its Brief, is plainly untenable.

The Government's whole argument revolves around the meaning of the words "residuary estate". The first difficulty with the Government's argument is that, strangely enough, it is without application to the case, and, in fact, defeats the Government's contention in this case.

The Government argues that all that the charities got was the residuary estate, and therefore all that could be deducted as the charitable deduction was the residuary estate as defined by the cases which it cites. But, in the first place, as we have pointed out, the amount which the Government claims to be the residuary estate is not the true residuum in the sense in which the Government uses that word, for it is not "that which remains after all paramount claims on the estate have been satisfied".

The State Taxes have not been taken out; and certainly we do not get to a true residuum in that sense until they are taken out. The very fact that the Government has admitted that the State Taxes are not to be first deducted, shows that it realizes that the charitable deduction is not the residuum in this sense of the word.

The real fact is that the search after the meaning of the words "residuary estate" is wholly beside the point and gets us nowhere. The Federal Estate Tax Law does not use that expression, so we are not confronted with defining a phrase in the statute. When we look to the cases, it is evident that the meaning given to the phrase varies in each case with the sense in which it is used. Like most words in the English language, the exact meaning must depend upon the context and association. But the question with which we are here dealing is what is the meaning in the Federal Estate Tax Law of the words "amount of all bequests, legacies, devises or gifts". We say that when a tax statute such as the Federal Estate Tax Law speaks of the amount of a legacy, it means the amount of the legacy without diminution by the tax it, itself, imposes. The avoidance by the Government of any reference in the single point in its brief to the precise language of the Statute indicates the difficulty in which it is involved. If the "amount" of a legacy or bequest to charity means, as is contended, the amount which the legatee ultimately receives and not the amount which passes by the provisions of the will undiminished by the incidence of taxation, then it would follow of course that both specific and residuary legacies to charities which are subject to varying rates of taxation in the different States, especially where such legacies are not given to local charities, must be deducted from each charitable legacy before determining the amount to be deducted for the purpose of ascertaining the net estate subject to taxation. It can, we think, scarcely be conceived that Con-

gress by the use of the phrase "amount of all bequests", etc., could have intended such a consequence.

We have an illustration, closely in point, in the use of the words "net estate". Unquestionably, the words "net estate" in some associations mean exactly what the Government contends is the meaning of "residuary estate", *i. e.*, what would be left to the legatees after all charges have been paid; but the words "net estate" as used in the Federal Estate Tax Law have the meaning of the estate before the Federal Tax, for it is upon the net estate that the Federal Tax is imposed.

It is unquestionably the fact that all that the residuary legatee gets is what is left after everything prior to his claim has been paid; but from the standpoint of the tax laws that does not constitute the amount of a legacy which passes under the residuary clause of a will. For example, nothing is clearer than that the States do not take into account what the residuary legatee will receive after its own tax has been paid; but, on the contrary, they regularly ignore their own tax completely in the calculation of the residuary estate. That was the exact question presented and decided in *Matter of Estate of Swift, supra.* Millions of dollars in taxes would be saved if the tax laws were otherwise construed, but it is the universal rule that they are not.

But the Government's argument gets it into still deeper waters. The Government cites many cases from the State Courts to support its argument that the Federal Estate Tax is an expense of the estate in exactly the same way as administration expenses, and, therefore, should be deducted just as are administration expenses. But where does this argument lead the Government? If its contention is correct that the Federal Estate Tax should be treated the same as an administration expense or other like charges against the estate, then, in the case of every estate that was taxable under the law involved

in this case, the tax constituted a proper deduction from the gross estate. The statute in effect at the time of the death of Mrs. Sage provided that there shall be deducted "such amounts for * * * administration expenses * * * and such other charges against the estate as are allowed by the laws of the jurisdiction * * * under which the estate is being administered". (It was not until 1919 that Congress provided that this deduction should not include any estate or inheritance taxes.)

Accordingly, if the Federal Estate Tax is properly to be treated as a charge against the estate the same as an administration expense and deducted as an administration expense in computing the amount of the residuary legacy, then it must certainly be deducted as a charge against the estate and as an administration expense in determining the amount of the net estate subject to the tax. Of course deducting the Federal Estate Tax from the gross estate as an administration expense produces exactly the same result as though the gift to charity is computed without deducting the Federal Estate Tax.

The Government seeks to escape the New York rule that from the standpoint of taxes the Federal Estate Tax is not to be deducted in determining the residuary estate; but in attempting so to do, it has been forced to adopt the other rule which makes the Federal Estate Taxes an "administration expense" or "other charges against the estate".

In short, the Government's argument comes to this: It starts with the false assumption that it is calculating the charitable deduction as the residuum in accordance with its definition thereof. This it is not doing, for the residuum is after the payment of State taxes, and those are not deducted by the Government. Thus, by its own action it admits the incorrectness of the theory that the charitable deduction should only be the true residuum, viz., the amount which the beneficiary actually receives.

Further, its argument as to what constitutes the residuum is wholly beside the point, for from the standpoint of the tax laws that amount is never regarded as the amount of the residuary estate. Finally, the Government's argument that the Federal Estate Tax must be deducted before determining the residuum, because that tax is to be deducted as any other administration expense, necessarily leads to the result that the Federal Estate Tax should be deducted from the gross estate under the express provisions of the statute then in force permitting the deduction of administration expenses and other like charges.

Respectfully submitted,

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No. 276.

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

WILLIAM H. EDWARDS, FORMERLY COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF NEW YORK, PETITIONER,

v.

JOSEPH GERMAIN SLOCUM, HERBERT GERMAIN SLOCUM, STEPHEN L'HOMMEDIEU SLOCUM, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONER.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONER.

By this writ of certiorari the petitioner, collector of internal revenue, seeks review of a judgment of the Circuit Court of Appeals for the Second Circuit affirming a judgment of the District Court for the Southern District of New York in favor of the respondents against the collector for $412,366.42, together with interest, which amount represents, as found by that court, an overpayment of estate taxes assessed upon the estate of Margaret Olivia Sage, deceased.

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STATEMENT.

The respondents are executors of the will of Mrs. Sage, who died on November 4, 1918, a resident of the City of New York, leaving a will by which she disposed of an estate of about $49,000,000. By this will, after providing for the payment of debts, she made certain pecuniary and specific legacies with directions that the same should be paid free from all legacy or inheritance taxes, and divided the residue into a certain number of equal parts and bequeathed to each of 35 charitable and educational institutions, for charitable, public, and similar purposes, one or more of such equal parts. The effect was to bequeath her entire residuary estate to these institutions. The executors duly filed with the collector a return and paid to the collector the sum of $1,406,865.07, being the amount of the estate tax due and payable upon the basis of said return.

Subsequently the Commissioner of Internal Revenue assessed an additional estate tax of $525,914.22 upon the estate, which was paid under protest (p. 3). Thereafter claim for refund to the extent of $525,801.79 was filed and rejected by the Commissioner. After this action was brought, the collector consented to the entry of judgment in favor of the executors in the sum of $112,172.17, leaving a balance of $413,629.62, the amount of the recovery now sought in this action. The facts were not in dispute, so the collector moved for judgment, dismissing the complaint upon the ground that it did not state facts

sufficient to constitute a cause of action. This motion was denied, with leave to the collector to answer within ten days. The collector did not answer, and final judgment for the amount claimed, with a slight and immaterial deduction, was entered. That judgment was affirmed by the Circuit Court of Appeals, and its judgment now comes before this court for review.

QUESTION INVOLVED.

The question involved is whether, in computing a residuary estate, the amount of the Federal estate tax should first be deducted. The Government claims that it should; the executors that it should not.

The executors computed the value of the residuary estate by deducting from the gross estate the amount of the general legacies, debts, administrative expenses, and other charges, without reference to estate taxes. The Commissioner of Internal Revenue recomputed the amount of the residuary estate by subtracting therefrom the amount of such taxes. The specific question is, Which form of computation was correct under the law?

Disregarding all inheritance, legacy, transfer, or estate taxes, the facts about the property passing under this will were as follows:

Debts and expenses	$3,789,321.74
Pecuniary legacies for charitable purposes	1,285,000.00
Pecuniary legacies for noncharitable purposes	8,618,079.55
Remainder, called "residuary"	35,436,855.70
Total	49,129,256.99

The net estate subject to tax, as stated by the executors, was as follows (pp. 4, 5, 6, and 32):

Gross estate		$49,129,256.99
Deductions:		
(1) Debts and administrative expenses	$3,789,321.74	
(2) Charitable legacies other than residual	1,285,000.00	
(3) Residuary for charity	35,436,855.70	
(4) Specific exemption	50,000.00	
		40,561,177.44
Net estate		8,568,079.55

This statement shows the residuary estate for charity to be that which was left after deducting from the gross estate the debts, the expenses of administration (other than estate taxes), charitable bequests other than residual, and the specific exemption of $50,000.

The New York inheritance tax on such legacies as the will declared free of tax was $5,741.83. The account as restated by the Commissioner of Internal Revenue adopted all the executors' figures except those for the residuary estate for charity, which he reduced to $33,610,506.75, thereby increasing the net estate by the amount of the reduction, and on investigation this difference is found to be exactly the total of the estate tax assessed, as follows:

Federal estate tax	$1,820,607.12
New York inheritance tax	5,741.83
Total	1,826,348.95

In other words, the executors computed the residuary estate as what was left after providing for everything except estate taxes; the Commissioner regarded the residuary estate as being what was

left after deductions, including the estate taxes, had been made.

Upon the concrete facts shown by these figures the point at issue may again be stated as follows: Is the residuary estate that which is left after taxes are paid or before they are paid?

STATUTES INVOLVED.

Section 201 of the Revenue Act of 1916 (Act of September 8, 1916, ch. 463, 39 Stat. 756) provides in part as follows:

> That a tax * * * equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States; * * *.

This section was amended by Section 300 of the Act of March 3, 1917, ch. 159 (39 Stat. 1000), increasing the rates of tax; and by Section 900 of the Revenue Act of 1917 (Act of October 3, 1917, ch. 63, 40 Stat. 300) additional estate taxes were levied upon the transfer of the estates of decedents dying after the passage thereof. Section 203 of the Revenue Act of 1916 provides in part as follows:

> That for the purpose of the tax the value of the net estate shall be determined—
>
> (a) In the case of a resident, by deducting from the value of the gross estate—
>
> (1) Such amounts for funeral expenses, administration expenses, claims against the

estate, unpaid mortgages, losses incurred dur-
the settlement of the estate arising from fires, storms, shipwreck, or other casualty, and from theft, when such losses are not compensated for by insurance or otherwise, support during the settlement of the estate of those dependent upon the decedent, and such other charges against the estate as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered; and

(2) An exemption of $50,000.

Section 403 (a) (3) of the Revenue Act of 1918 (Act of February 24, 1919, ch. 18, 40 Stat. 1057) provides:

That for the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

* * * * *

(3) The amount of all bequests, legacies, devises, or gifts, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, scientific, liter-

ary, or educational purposes. This deduction shall be made in case of the estates of all decedents who have died since December 31, 1917; * * *.

As Mrs. Sage died on November 4, 1918, this provision applies to her estate.

ARGUMENT.

I.

The residuary estate is that which remains after all paramount claims upon the estate have been satisfied.

Judge Hough, writing for the Circuit Court of Appeals, states very clearly and forcibly certain fundamental and conceded propositions involved in this case as follows (p. 33):

> That this is not an inheritance or legacy tax, that it is not payable by legatees or out of legacies as such, and that it is a tax payable out of and on the estate and by the executors is agreed (Matter of Hamlin, 226 N. Y. 407), and no complaint is now made as to including in whatever is taxed or measures tax the New York inheritance taxes. (*New York &c., Co.* v. *Eisner*, 256 U. S. 345.)
>
> Taxes, however, are not laid on abstractions, names do not change facts, and every tax ultimately falls on some person, unless it be laid upon a thing without an owner, which is rare.
>
> So far as the words of this statute are concerned, the United States does not care who ultimately bears the weight of this tax; it

> announces the sum and demands payment from the executors; if the legatees and devisees cannot agree as to the burden bearing, the State courts can settle the matter. The New York courts have settled it, so far as this estate is concerned, by the Hamlin case (supra), and this tax is payable out of the whole estate as a permanent charge, which in effect casts it on or takes it out of the residuary. That the residuary estate is devoted to charity, &c., makes no difference.

These executors exercise their duties pursuant to the laws of the State of New York, where they were appointed, and will account to the courts of that State in accordance with its law. Under the law of that State the Federal estate tax will be paid out of the residuary estate under the principle laid down by the Court of Appeals of that State in *Matter of Hamlin*, 226 N. Y. 407. Therefore, the amount stated by the executors as the residuary estate which will go to the charitable beneficiaries of Mrs. Sage is not the amount which they will receive. From that amount will be deducted before it reaches the beneficiaries, even if the judgment herein is affirmed, the sum of $1,406,977.50.

The question is whether "the rest, residue, and remainder of my estate," which Mrs. Sage bequeathed to charity, means the amount which will actually be given to them or whether it means the amount which they would receive if there was no Federal tax. It is a question of the meaning of the term "residuary estate," and, as Judge Hough says,

the fact that it is devoted to charity makes no difference.

That the amount of the residuary estate is what is left after the subtraction of all paramount claims is not open to question. It is a term which has been known to the law long before there were any Federal estate taxes. In *Morgan* v. *Huggins*, 48 Fed. 3, at page 5, it is defined as "what is left after all liabilities are discharged and all the objects of the testator are carried into effect." In defining the residue in the case of an estate subject to the Federal estate tax the court said in *Plunkett* v. *Old Colony Trust Company*, 233 Mass. 471, at pages 475 to 476:

> It is the general rule that, failing any testamentary provision to the contrary, debts, charges, and all just obligations upon an estate must be paid out of the residue of an estate. The benefaction conferred by the residuary clause of a will is only of that which remains after all paramount claims upon the estate of the testator are satisfied. *Tomlinson* v. *Bury*, 145 Mass. 346. The tax is a pecuniary burden or imposition laid upon the estate. *Boston* v. *Turner*, 201 Mass. 109-193. In its nature it is superior to the claims of the residuary legatee. Since neither the act of Congress nor the will and codicils make any other provision for the point of ultimate incidence of this tax, it must rest on the residue of the estate. *Matter of Hamlin*, 226 N. Y. 407, 418, 419.

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It is this amount, and this amount only, which, under the statute, is deductible from the gross estate in the case at bar. The residue as computed by the executors is what is left after the fixed legacies, debts, and administration expenses are paid but before the Federal estate tax is paid, a tax which is prior to all charges except possibly administration expenses. It reduces the residue just as surely as do funeral expenses, executors' and attorneys' fees, and debts, and is no more a part of the residue than they are.

The fallacy of contending that the Federal estate tax must not be subtracted in obtaining the amount of the residue left to charities is made evident if we suppose a case where the residuary estate, without diminution by reason of the Federal tax, was less than the tax. In that case the residuary legatees would receive nothing. If that were the situation here, and if the specific and general legacies had been so large that the residuary estate was not equal to the amount of the Federal tax, then not only would the residuary beneficiaries of Mrs. Sage's bounty have received nothing but the other legacies would be reduced by contributions to pay the tax. This would be inevitable in an accounting proceeding by the executors under the authority of *Matter of Hamlin*, 226 N. Y. 407.

The New York courts have held that, under the State transfer tax act, in ascertaining the value of the residuary estate for the purpose of computing

the transfer tax, no reduction can be made for the amount of the Federal estate tax. *Matter of Swift*, 137 N. Y. 77; *Matter of Bierstadt*, 178 App. Div. 836; *Matter of Sherman*, 179 App. Div. 497, affirmed 222 N. Y. 540. That rule has been repeatedly criticized and repudiated by the courts of other jurisdictions and, so far as we have discovered, has been followed in but two states, Wisconsin and Rhode Island. It has been repudiated in other states as follows:

Massachusetts:

Old Colony Trust Company v. *Treasurer, etc.*, 238 Mass. 544. In that case the court said, at page 549:

> The United States estate tax should have been wholly deducted. In its nature such a tax is a charge upon the net estate transferred by death and not upon the succession resulting from death * * *. The estate, upon the death, is to the extent of the tax instantly depleted.

See also *Plunkett* v. *Old Colony Trust Company*, 233 Mass. 471, *supra*.

Connecticut:

In *Corbin* v. *Townshend*, 92 Conn. 501, the court said (pages 505, 506):

> It (the Federal estate tax) is an obligation against the estate and payable like any expense which falls under the head of administration expenses. The tax paid is no part of the estate at the time of distribution; it has passed from the estate and the share of the beneficiaries is diminished by just so much

> * * *. The payment of the Federal tax is an expense of the estate, as much so as any expense of administration.

New Jersey:

In re Roebling's Estate, 89 N. J. Eq. 163. Followed in *In re Kountze's Estate*, 93 N. J. Eq. 143.

Pennsylvania:

In Pennsylvania, before the statute was amended to provide specifically that the Federal estate tax should not be subtracted, it was held that it should be subtracted in computing the Pennsylvania collateral inheritance tax. *In re Knight's Estate*, 261 Pa. 537.

Indiana:

In the case of *State* v. *First Calumet Trust & Savings Bank*, 71 Ind. App. 467, the court said, at page 471:

> The tax paid to the Federal government upon the net estate before distribution can not in any sense be held to have been any part of the beneficial interest of the respective legatees or distributees, and the market value of such beneficial interest must of necessity be the value after deducting the federal tax, the same having been deducted from the net estate before distribution was made thereof, and it necessarily follows that the state inheritance tax should be computed upon the residue after deducting from the net estate the amount of such federal estate tax.

Illinois:

In *People* v. *Pasfield*, 284 Ill. 450, the court said, at page 454:

> The legatees and distributees can not in any sense be held to have "received" any part of the duty that is paid to the Government by the executor * * *. The Federal Estate Tax act of September 8, 1916, necessarily operated to lessen, by the amount of such tax, the clear value of the beneficial interest which passed to the heirs and legatees in the instant case and prevented their receiving any part of that tax, and the ruling of the county court that the same should be deducted before computing the State tax was correct. See also *People* v. *Northern Trust Company*, 289 Ill. 475.

Minnesota:

No case directly involving a residuary estate has been found, but in *State ex rel. Smith* v. *Probate Court of Hennepin County*, 139 Minn. 210, the question arose whether the Federal estate tax should be subtracted from the value of an estate passing by descent before computing the State inheritance tax. The court held that it should be.

Colorado:

People v. *Bemis*, 68 Col. 48.

Oregon:

In *In re Inman's Estate*, 101 Ore. 182, the court said:

> No part of the federal estate tax * * * ever passed, theoretically or actually, to the widow or daughters; for this tax was imposed

> and collected before its distribution, and, like the old probate tax, ought to be deducted from the gross estate just as expenses of administration are deducted (p. 200).

California:

Estate of Miller, 184 Cal. 674.

The following cases are, to some extent, authorities to the contrary:

Estate of Sanford, 188 Iowa 833.

In this case it was held that under the Iowa statute the Federal estate tax could not be subtracted. This decision, however, turned on the wording of the statute of Iowa, which provided that only "debts" could be deducted, and debts were defined by the Iowa code, Section 1471–a2, to include local or state taxes, funeral expenses, court costs, cost of appraisement, fees of executors, administrators, and trustees, premiums on bonds, attorneys' fees, and *no other sum*.

The Rhode Island case of *Hazard* v. *Bliss*, 113 Atl. Rep. 469, 43 Rhode Island, 431, holds that the Rhode Island legacy tax attaches at the time of death, and that if the Federal Government appropriates a portion of the estate, Rhode Island is not bound to recognize this fact for the purpose of reducing its tax. The decision was rendered with two of the five justices dissenting. That the majority opinion did not hold that the Federal estate tax is in fact part of the amount of the residuary bequest, as that term is commonly understood, appears from the following quotations:

> The payment of the federal tax of necessity reduced the value of the residuary estate * * *. (113 Atl. p. 473.)
>
> Such payment (of the Federal estate tax) reduces the amount of the residuary estate. (113 Atl. p. 477.)

The case of *Estate of Week*, 169 Wis. 316, one justice dissenting, squarely followed the New York rule. The court, however, frankly admits the inconsistency of allowing expenses of administration as a deduction and at the same time disallowing the Federal estate tax. The court says, at page 319:

> There may be some difficulty in reconciling this conclusion with the prevailing practice of deducting expenses of administration. We realize that our logic would lead to a rejection of such deductions. We have no disposition, however, to disturb the practice that has uniformly prevailed. We took the practice with the law from New York.

The executors argue that to lessen the residuary estate by the amount of the Federal estate tax is to violate the spirit of the statute which is designed to favor charities. No man would say, however, that the testatrix gave her debts and administration expenses to charity, and it is inconceivable that anyone should claim that she intended to give the amount of her taxes to charity, yet they are equally obligations which must be discharged before the charitable bequests are satisfied. Doubtless the law intended to favor charitable bequests by allowing the amount of such bequests as a deduction from estates.

The tax, however, is in no sense on the charities. It is on the estate, and if, as a matter of fact, it diminishes the share which goes to charity, that is something for which the testatrix and not the law is responsible. She can always protect the charities by giving them general legacies and leaving the residuary to individuals. The charities will then always receive the legacies free and clear of the Federal estate tax. In the case at bar the charities, owing to the enactment of Section 403, Subsection (a) (3), almost four months after the testatrix's death, will receive nearly $8,000,000 more than the testatrix could have expected they would receive. At the time of her death charitable bequests were not deductible, and the tax, if assessed under the law as it existed at that time, would have been approximately $10,000,000. But however that may be, the will and not the statute is the measure of the testatrix's bounty. She and her able counsel knew the law and the well-established meaning of terms like rest, residue, and remainder, and residuary estate, and the meaning of these words should not be upset in order that certain charities shall obtain several million dollars more than she contemplated at the time she made her will.

The correctness of the contention that the Federal estate tax is part of the amount of the residuary bequest to charity may be tested by considering the converse of the case at bar. If Congress in pursuing a mortmain policy had provided that the amount of all bequests to charity should be taxed at a higher

rate than other bequests, would the Government be permitted to compute the amount of a residuary bequest to charity for the purpose of imposing a higher tax without subtracting the amount of the Federal estate tax? Would it not shock the conscience of the court if a claim should be made that the Government could increase its tax by including in the amount of the residuary bequest to charity a sum no part of which ever could be, or was, given to charity and no part of which the residuary legatee could ever receive? Such an illustration simplifies the problem and strengthens the contention that the meaning of the well-known term residuary estate should not be construed as depending upon the purpose to which that estate is to be devoted, or the rate of taxes thereon, or the exemption of that estate from any tax.

Taxes are concrete realities, not philosophical abstractions. So are residuary estates. And when Congress provides that, in fixing the net estate for purposes of taxation, the amount of bequests to charity should be deducted and the bequest takes the form of the residuary estate, the residuary estate should be held to mean the amount which the beneficiary will receive after prior charges payable therefrom shall have been made.

That amount is one which can readily be computed by any accountant competent to keep the books of a forty-nine million dollar estate. Neither the method nor the accuracy of the computation, as made by the

Commissioner of Internal Revenue, is attacked in the complaint, so the consideration of mere mathematical computations is not involved. If the Federal tax is a part of the residuary estate, then the executors are right and the judgment should be affirmed. If they are not, the Commissioner of Internal Revenue was right and the judgment should be reversed.

CONCLUSION.

The judgment of the court below should be reversed.

JAMES M. BECK,
Solicitor General.
ALFRED A. WHEAT,
Special Assistant to the Attorney General.
DECEMBER, 1923.

○

No. 276.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1923.

WILLIAM H. EDWARDS, FORMERLY COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF NEW YORK,
Petitioner,

v.

JOSEPH JERMAIN SLOCUM, HERBERT JERMAIN SLOCUM, STEPHEN L'HOMMEDIEU SLOCUM, ROBERT W. DE FOREST AND HENRY W. DE FOREST, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF MARGARET OLIVIA SAGE, DECEASED,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND DISTRICT.

BRIEF FOR THE RESPONDENTS.

DE FOREST BROTHERS,
Attorneys for Respondents.

ROBERT THORNE,
Of Counsel.

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

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TABLE OF CASES.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1923.

WILLIAM H. EDWARDS, formerly Collector of Internal Revenue for the Second District of New York,
Petitioner,

v.

JOSEPH JERMAIN SLOCUM, HERBERT JERMAIN SLOCUM, STEPHEN L'HOMMEDIEU SLOCUM, ROBERT W. DE FOREST and HENRY W. DE FOREST, as Executors of the Last Will and Testament of Margaret Olivia Sage, deceased,
Respondents.

No. 276.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENTS.

By this writ of certiorari the petitioner, formerly the Collector of Internal Revenue for the Second District of New York, seeks review of a judgment of the Circuit

Court of Appeals for the Second Circuit affirming a judgment of the District Court for the Southern District of New York in favor of the respondents and against the Collector for $412,366.42, with interest, for the balance of an additional estate tax, held to have been improperly and unlawfully assessed upon the estate of Margaret Olivia Sage, and which was paid under protest by the respondents as her executors.

Statement.

The respondents accept in the main the statement of the case in the Government's brief as far as it goes, but that statement falls short of a fair and full presentment of the facts.

The respondents do not accept the Government's statement of the question involved.

Under a Tax Statute the broad policy of which throughout is to favor and exempt charities in every possible way, the Government in the present case is seeking by a strained and artificial construction and application violating both the letter and the spirit of the Act to cast an additional tax burden of over $400,000. on the charitable legatees under Mrs. Sage's Will.

The question at issue, therefore, is the proper method and procedure to be followed in computing the Federal Estate Tax under the provisions of the Revenue Act of 1916 as amended by the Revenue Act of 1918, when charitable legacies (which under the Statute are not taxable) constitute the entire residuary estate of the decedent.

The Executors made a return in the usual manner and form *without considering the tax itself in any way,* which return may be summarized as follows:

Value of the gross estate		$49,129,256.99
Funeral and administration expenses and debts	$3,781,321.74	
Amount of general bequests to charitable, religious, educational and similar purposes	1,285,000.00	
Amount of residuary bequests to charitable, religious, educational and similar purposes	35,436,855.70	
Specific exemption	50,000.00	40,561,177.44
NET ESTATE		$8,568,079.55
TAX		1,406,977.50

The net estate of $8,568,079.55 ascertained and returned as above must be and is in fact the exact amount of all bequests and devises to other than charitable legatees, less the specific statutory exemption of $50,000, and the Executors insist that this is the only amount and the whole amount that is taxable under the letter and the spirit of the Act.

The Government disputes only the one item of the amount of the charitable residuary bequests, claiming that the Federal Estate Tax itself should be considered and determined and deducted from the charitable residue *before* ascertaining, and for the purpose of ascertaining the net estate. By thus decreasing the deduction for the charitable residuary bequests the net estate is increased over the total aggregate amount of all bequests and devises to non-charitable legatees by the exact amount of the Estate Tax, and the tax is increased by the amount of the tax computed on the tax.

The Government contends that since under the law of New York the burden of the Federal Estate Tax falls upon the residuary estate the charitable residuary legatees will not actually receive the whole residue, but only so much as is left after the Estate Tax is taken out of it, and therefore that the Estate Tax should be computed and paid not only on so much of the estate as passes to non-charitable legatees but also upon the Estate Tax thereon which is taken out of the residue and paid to the Government, and again on the additional Estate Tax thus computed and so on progressively, the Estate Tax continually increasing as in the computation in each case it is imposed upon itself, with the result that there is a series prolonged to infinity.

It is obvious that it is impossible under the Government's theory to compute the tax by arithmetic, and for the purpose of determining the result of this infinite series of taxes on taxes, the mathematical experts of the Treasury Department worked out an algebraic formula to be used for the purpose of computing the tax when the residuary estate is left in whole or in part to charitable legatees. That formula and its application to the decedent's estate are set forth at length in the Amended Bill of Complaint (Record, pp. 6, 7) the formula being as follows:

EXPLANATION OF TERMS USED.

G = Gross estate
N = Net estate
R = Residue
T = Federal Estate Tax
D = Known deductions } When taken together
E = Specific deductions } known as A
S = Property specifically disposed of (this includes specific bequests, transfers, debts, funeral and administration expenses and State Inheritance Taxes)

K = Total tax on all blocks up to the last one used
B = Total of blocks the tax on which is represented by K
% = Rate of tax on the last block

FORMULA

$$G = R + S + T$$
(1) $$R = G - S - T$$
$$T = K + \% (N - B)$$
$$T = K + \% N - \% B$$
$$T = K + \% [G - (A + R)] - \% B$$
$$T = K + \% G - \% (A + R) - \% B$$
$$T = K + \% G - \% A - \% R - \% B$$

Substituting in (1)

$$R = G - S - (K + \% G - \% A - \% R - \% B)$$
$$R = G - S - K - \% G + \% A + \% R + \% B$$
$$R - \% R = G - S - K - \% G + \% A + \% B$$

Counsel for the Government in their brief in this Court discreetly refrain from any reference to this formula. In the Court below, however, they sought to justify it and to explain it and insisted that it was quite simple; but the respondents respectfully submit that it is a triumph of higher mathematics quite beyond the comprehension of the ordinary citizen.

The question involved in the case at Bar may therefore be completely and concretely stated as follows:

> Does the proper method and procedure for the computation of the Federal Estate Tax under the Revenue Act of 1916 as amended by the Revenue Act of 1918, where the residuary estate is left to charity, require that the amount of the Estate Tax should be considered and determined by means of an algebraic formula before the ascertainment of the net estate and added to the net estate for the purpose of the computation of the tax and the Estate Tax thus increased by the amount of the tax on the tax?

ARGUMENT.

I.

The Formula.

The purpose and the result of the use of the formula in the present case is the addition to the net estate of the sum of $1,820,607.12 which is the amount of the tax computed on the actual net estate plus that same amount, thus creating a purely fictitious and artificial basis for the computation of the tax; it is not the actual net estate—it is not the amount which passes to the non-exempt legatees or to anybody. It is simply an arbitrary figure which represents the taxable estate plus $1,820,607.12 and the resultant tax claimed is a tax on the net estate plus a tax on the added sum of $1,820,607.12 which has no existence as any part of the decedent's estate.

By the use of that formula the Government before ascertaining, and in fact without ever ascertaining the net estate as required by the Statute, determines the amount of the Estate Tax by including the amount of the tax on the tax in a series prolonged to infinity. But the respondents contend that any construction of the taxing statute which requires in its application and in the computation of the tax the use of that formula must be wrong. No such construction and no such method of computing the tax could possibly have been within the legislative intent. It is inconceivable that Congress when it directed by the Statute that an executor should file a return under oath setting forth the value of the net estate ascertained as therein prescribed and the tax payable thereon, intended to impose a tax which, in the very ordinary and frequent case where the residuary estate

is left in whole or in part to charity, could be computed only by an expert skilled in higher mathematics.

Referring to this feature of the case Judge Hough says, in his opinion in the Circuit Court of Appeals (Record, p. 34):

> "We need not go so far, but do hold that the presumption is that Congress intended a simpler method —one that a plain man can understand. Algebraic formulæ are not lightly to be imputed to legislators."

In the enactment of the present Revenue Laws a change was made from the Legacy Tax of previous Federal Inheritance Tax Laws to an Estate Tax for the express purpose of substituting a tax which would be simpler and easier of application and computation. Mr. Kitchin, the Chairman of the Ways and Means Committee, in explaining to the House the nature and purpose of the Estate Tax Law, said:

> "We levy the tax on the transfer of the flat or whole net estate. We do not follow the beneficiaries and see how much this one gets and that one gets, and what rate should be levied on lineal and what on collateral relations, but we simply levy on the net estate. This also prevents the Federal Government through the Treasury Department going into the Courts and contesting and construing wills and statutes of distribution".
>
> (See Matter of Hamlin, 226 N. Y. 407 at p. 415.)

As an incidental step in the computation of the tax it is necessary to determine the amount of the charitable residuary legacies, which amount under the Statute is deductible from the gross estate to ascertain the net estate, *but such determination of the charitable residue is solely for the purposes of the taxing statute.* The Government is not concerned with what any legatee,

charitable or otherwise, will ultimately receive and the question of the amount of the residue whether charitable or otherwise, for the purposes of the taxing statute is controlled by the settled principle and rule universally accepted and adopted in the construction and application of a taxing statute and the computation of a tax, namely, that a tax must always be levied and computed without regard to its own incidence.

Mrs. Sage by her Will gave general and specific legacies and devises to individuals aggregating $8,618,-079.55, and also general legacies to charities aggregating $1,285,000. The whole of her large residuary estate was left to charity.

Her Executors adopted the simple, direct and obvious method of ascertaining the net estate and computing the tax which would naturally be followed by the ordinary intelligent person. They deducted from the gross estate the debts and administration expenses and the general and specific legacies and devises to find the amount of the residuary estate, all of which was left to charity. Then in order to ascertain the *net estate* under the statute, they deducted from the gross estate the debts and administration expenses; the general charitable legacies; the charitable residuary estate and the specific exemption of $50,000, and the net estate thus determined was necessarily the exact amount of all legacies and devises other than charitable, less the specific exemption of $50,000.

It would seem clear that under the facts in the present case the *net estate* the transfer of which was properly subject to Federal Estate Tax under the letter and the spirit of the Act would be only the exact amount of all legacies and devises other than charitable, less the specific exemption of $50,000.

Judge Rose, of the District of Maryland, in the recent case of Dugan *vs.* Miles, 276 Fed. Rep. 401, in which the amount of the Federal Estate Tax was involved (though not the precise question presented in the case at bar), *took exactly this view of the matter.*

In the opening paragraph of his opinion he uses the following language:

276 Fed. Rep. 402:

> "The late Thomas O'Neill bequeathed some taxable legacies to persons other than his widow, but as there is no dispute about the tax on them they may be ignored in this discussion. All the rest of his large property was left to trustees, during the life of his widow. They were to accumulate the income thereon, were to pay to her an annuity of $25,000. during her life, and at her death, after applying $250,000. to such uses as she might by will appoint, they were to turn all the rest of the estate over to three corporations, legacies and devises to every one of which were exempt from the estate tax. *All therefore that can be taxable is what the widow is either to receive or to dispose of.*"

And again on page 402:

> "It is clear that this sum largely exceeds the present value of everything which will in any sense ever go to the widow, and that therefore something has been taxed which Congress intended to exempt."

Having computed the exact present worth of all that the widow was ever to receive or dispose of, Judge Rose then said (p. 403):

> "And that is all that should be taxable if full effect is to be given to the will of Congress."

On appeal one part of the decision was reversed but on this point the Circuit Court of Appeals (Fourth Circuit) followed Judge Rose (292 Fed. 131).

This is a short and simple way of ascertaining the exact amount of the estate the transfer of which is properly subject to the Federal Estate Tax, but the same result is reached by preparing a return in the usual way, following the express provisions of the Statute and adopting the method which was followed by Mrs. Sage's executors and which would seem to any one to conform to the evident and clear meaning of the law.

Judge Hough in his opinion, referring to the case of Dugan *vs.* Miles, says (Record, p. 35):

> "So far as the authority goes, Dugan *v.* Miles, 276 Fed. 401, is the only decision suggested on this branch of the statute. The facts in that litigation were legally identical with those at bar; yet it is true that the doctrine here contended for by the Treasury was not alluded to by the experienced and able judge who wrote the opinion, although his result is consistent only with the methods pursued by these defendants in error. The inference is that neither the judge nor counsel on either side thought of such a theory—which does not seem to us surprising."

II.

It is an elementary and fundamental principle of taxation that a tax is imposed and assessed wholly without regard to the incidence of the tax itself.

This proposition or rule of law requires no citation of authorities. It is universally accepted and applied and has been accepted and adopted by the District Court and by the Circuit Court of Appeals as controlling in the case at Bar.

As Judge Hough, writing for the Circuit Court of Appeals, says (Record, p. 35):

> "As Holmes, *J.*, remarked in the New York Trust Co. case (*Supra*), 'Upon this point a page of history is worth a volume of logic'. History so far as we can discover, shows no other instance of attempting to measure a tax *pro tanto* by itself. As Hand, *J.*, said in the Court below, this theory departs from long established practice and from the usage if not the law of never regarding the incidence of the tax in the levying of a tax."

In every State legacy or succession taxes whether imposed on the right to transmit or the right to receive, or whether imposed on the estate as a whole or on the interests of the beneficiaries are levied and computed wholly without regard to the incidence of the tax itself.

The amount of the residuary estate is determined under the law of the State of New York without deducting the New York Transfer Tax or any Estate or Inheritance Taxes, whether Federal or State, *and the amount of the charitable residuary bequests under Mrs. Sage's Will has been so determined.*

See

Matter of Swift, 137 N. Y. 77;
Matter of Penfold, 216 N. Y. 163; also 216 N. Y. 171;
Matter of Sherman, 179 App. Div. 495; affd. 222 N. Y. 540.

We submit that this rule must be consistently followed in every case for every purpose and in every step in the computation of the Federal Estate Tax; that the amount of the net estate must accordingly be ascertained without considering the Estate Tax itself in any way and if in the process of ascertaining the net estate it becomes

necessary to determine the amount of the residue the same rule must be followed and that also must be determined without considering the tax in any way.

The Government adopts and follows this rule and wholly disregards the tax in the ascertainment of the net estate and the computation of the tax, in every case except where the residuary estate is left in whole or in part to charity, and in such case alone it wholly disregards the rule and by means of a complicated algebraic formula determines the tax before ascertaining the amount of the net estate upon which under the Statute the tax must be computed, the tax thus pre-determined being based upon an artificial and fictitious net estate which is composed of the actual net estate plus the amount of the tax itself.

The whole Act looks to the property of the decedent when he dies and which is transferred from him to his beneficiaries before payment of the tax, and wholly disregards the property which the beneficiary will ultimately receive after the payment of the tax. The tax is measured by the net amount of the estate transferred regardless of the tax itself. The amount of the tax is not considered in determining the value of the gross estate or of the net estate. For all purposes of the application of the Act and the computation of the tax the Government recognizes the theory and principle that the tax is based upon that which is transferred from the decedent regardless of the tax itself, except only in connection with the Exemption Clause providing for the deduction of the amount of charitable bequests where it adopts the directly opposite theory of regarding not what is transferred subject to the payment of the tax, but what the beneficiary may receive after the tax has been paid out of the prop-

erty transferred. In other words, the Government blows hot and cold at the same time, adopting one theory for the purpose of ascertaining a residue subject to tax, and a directly opposite theory for the purpose of ascertaining a residue exempt from tax.

Where the Government undertakes to determine the amount of the estate in order to tax it, it insists that the amount of the tax to be imposed should not be considered. The taxing authority closes its eyes to that which is taken out of the estate by way of taxes, and values the estate as though it itself took nothing from it.

Consistently the same rule must be adopted and followed in computing the amount or value of an estate for the purpose of exempting it as when computing the amount or value of an estate for the purpose of taxing it.

If a tax were being imposed upon the residuary estate, its amount would be determined without deducting from it the tax itself. Obviously, when the amount of the residuary estate is to be determined, not for the purpose of taxing it but for the purpose of exempting it, the same rule must be applied. The expression "amount of the legacy" must have the same meaning, whether it be used to state the amount to be taxed or the amount not to be taxed.

The Government strenuously asserts that, in determining the amount to be taxed, we must entirely disregard the incidence of the tax, *i. e.*, that we must ignore the fact that the amount received by the legatees will be reduced by the amount of the tax; but it now asserts that, in determining the amount not to be taxed, the incidence of the tax should be regarded, *i. e.* that we should take into account the fact that the amount to be received will be

reduced by the amount of the tax. There is obviously no basis in logic or in reason for the distinction. The Government's claim in this case so clearly violates fundamental principle, and is so unfair that the lower courts unanimously and promptly overruled it.

Any tax is ordinarily paid out of the property upon which it is imposed, or in other words the property taxed includes the amount of the tax which is afterwards paid out of that property. But that is the logical result of the universal rule that a tax is always imposed without regard to its own incidence and is a very different matter from *adding* the amount of the tax itself to the value of the property subject to tax, thus creating a purely artificial basis for the imposition of the tax and resulting in an increased tax not computed upon the actual value of the property taxed and including the amount of the tax, but upon that value plus the tax. Such a method and procedure for the computation and imposition of a tax is utterly indefensible and we venture to say was never before proposed or attempted by any taxing authorities.

III.

For all purposes of an Estate Tax or an Inheritance Tax the residue of an estate is that which is left before the tax is taken out.

The entire argument of the Government is presented under the heading of a single proposition of law, namely, that the residuary estate is that which remains after all paramount claims upon the estate have been satisfied.

For the purposes of a judicial accounting and from the standpoint of the residuary legatees that statement

may be true; but it is not true from the standpoint of a Tax Statute or for the purposes of the computation of an Estate Tax or an Inheritance Tax.

The Government has admitted that the State Estate Taxes which are also paramount charges on the whole estate and have in fact been paid out of the charitable residue should not be deducted in determining the amount of the charitable residue to be deducted for the purposes of the Federal Estate Tax and has consented to the entry of judgment in this action in favor of the Executors in the sum of $112,172.17 with interest, representing the tax on the aggregate amount paid by the Executors for State Estate and Inheritance Taxes and which the Government had previously treated in the same manner as the Federal Estate Tax and had deducted from the residue left to charity before in turn deducting that residue from the gross estate.

Under the law of New York the value of an estate for the purpose of computing the State Transfer Tax is determined without deducting any Estate or Inheritance Taxes, either Federal or State, and the New York rule is followed in the States of Wisconsin and Rhode Island.

The Government cites a number of cases in other States holding in substance that the Federal Estate Tax is in the same catagory with debts and administration expenses and must therefore be deducted before assessing the State Estate or Inheritance Taxes; but in those same States the value of an estate, and of any legacy, residuary or otherwise, for the purpose of the computation of their own State Estate or Inheritance Taxes is determined without considering and without deducting such State Estate or Inheritance Taxes.

The argument of the Government and the logic and reasoning of every one of the cases cited upon this point lead inevitably to the conclusion that the Federal Estate Tax must in every case be deducted from the gross estate in order to determine the net estate under the express provisions of the Revenue Act of 1916.

In the Massachusetts case quoted on page 11 of the Government's brief the State Court says (238 Mass. 549):

> "The estate upon the death is to the extent of the tax instantly depleted."

The New Jersey Court says in the case cited on page 12 (89 N. J. Eq. 168):

> "The clear market value of the property transferred from the dead to the living is the value of the estate after all lawful charges against it, including taxes, are satisfied."

In the Oregon case the Court said, as quoted on pages 13 and 14 of the Government's brief (101 Ore. 182):

> "No part of the Federal Estate Tax * * * ever passed, theoretically or actually, to the widow or daughter; for this tax was imposed and collected before its distribution and like the old probate tax ought to be deducted from the gross estate just as expenses of administration are deducted."

The Revenue Act of 1916 provides that the value of the net estate shall be determined by deducting, among other things,—

> "such other charges against the estate as are allowed by the jurisdiction, whether within or without the United States, under which the estate is to be administered."

The position of the Government is therefore in every aspect illogical, inconsistent and unsound. If the Federal

Estate Tax is a paramount charge against the whole estate allowed by the jurisdiction of the State under which it is administered and in the same category with debts and administration expenses, it is under the express words of the Act deductable in every case from the gross estate in order to ascertain the net estate. In other words, if for the purposes of the taxing statute the residuary estate is only that which is left after the tax is paid, then the tax is deductable from the gross estate in every case, but if the Act is to be construed and applied without regard to its own incidence then the residuary estate must for the purposes of the Act he deemed to be that which is left *before the tax is paid.*

The supposititious case stated on page 10 of the Government's brief, namely, where a residue left to charity without diminution by the amount of the Federal Estate Tax is less than the bequest, *does not* show the fallacy of the respondents' contention, but on the contrary demonstrated the injustive and unsoundness of the Government's argument. In such a case it is true the charitable residuary legatees would receive nothing and there would be a necessary abatement of the general legacies to pay the tax. But the residuary estate determined without considering the tax and which was left to charity by the Will, should nevertheless be deducted, because no penny of it is left to any non-charitable legatee and no penny of it would pass to any non-charitable legatee and therefore no part of it should be taxed under the Revenue Act of 1916. It would be manifestly unfair, unjust and not contemplated by the Statute that the estate tax should be imposed and computed on an amount in excess of all the bequests to non-charitable legatees and that general legacies already subject to abatement to pay the estate tax should suffer a further abatement to pay an additional

tax computed on an amount taken out of the estate by the Government and which was not in form or in fact left to any non-charitable legatee and no penny of which in any event could pass to a non-charitable legatee, and no penny of which could form part of the net estate.

The other supposititious case stated in the Government's brief on pages 16 and 17 does simplify the problem and strengthens the contention, not, however, of the Government, but of the respondents. If Congress could have passed a law providing that the amount of all bequests to charity should be taxed at a higher rate than other bequests, all such charitable bequests, whether general or residuary (and there could be no reason for making any distinction between them) under well settled principles of law would be taxable at such increased rate at their full face amount without considering the tax and without making any deduction for the tax in any case.

IV.

The Government's method of computing the tax results in the imposition of a further and very heavy tax burden upon charitable residuary legatees in violation of the clear intent and policy of the act of favoring charities in every way and exempting them from any and every form of tax imposed thereby.

The Estate Tax is not contained in a separate or special act of Congress, but is a part of the General Revenue Acts of 1916 and 1918, and therefore all parts of those Acts must be read together to ascertain their true intent and meaning. The broad policy clearly appears throughout the recent Revenue legislation of Congress,

not only of relieving and exempting charities in a broad sense from any and every form of tax imposed by the said Acts, but further of fostering and favoring charities by provisions indirectly operating to their advantage, as in the case of the taxes on admissions and dues. This policy is even carried to the point of exempting from the Income Tax up to 15% of the income of any individual given by him to charity. The Estate Tax being in form assessed upon the decedent's estate and not upon the separate interests of the beneficiaries, the exemption of charitable bequests and devises is accomplished by providing that the amount of all such bequests must be deducted from the gross estate for the purpose of ascertaining the net estate subject to taxation.

That part of the Revenue Act of 1918, the clear purpose and intent of which is to favor charities and to exempt them from the Estate Tax and which may properly be called the Exemption Clause of the Estate Tax Title should therefore be broadly construed and applied in order to give the fullest possible effect to that intent and thus bring the construction and application of the Estate Tax Title into harmony with the broad policy, clearly appearing throughout the Act, of favoring charities in every possible way.

The Federal Courts have directly held that provisions in favor of charities should be broadly construed in conformity with the spirit of the Act, and that the substance and spirit and not mere form and words should control.

Thus in Lederer *vs.* Stockton (266 Fed. Rep. 276, affirmed 260 U. S. 4), the Circuit Court of Appeals, in construing the provisions of the Income Tax Law exempting from the Income Tax income passing to charities, said:

> "It is clear that when substance and spirit and not mere form and words are the interpreters of

> the Statute, the receipt of this income by the Hospital's agent and representative was in truth and reality a receiving by the Hospital."

The estate of the decedent transferred under her Will falls naturally into two parts, one part legacies to individuals and the other part legacies to charities. The first part is taxable. The second part is not taxable. In view of the clear intention to favor charities in every possible way it probably was not within the contemplation or intention of Congress that the Estate Tax on taxable legacies should be actually charged against and paid out of non-taxable legacies. But that result unavoidably follows in a New York estate under the decision in the Court of Appeals in the Hamlin case (226 N. Y. 407) holding that the Federal Estate Tax is a charge against the whole estate and payable by the Executors as an expense of administration.

It certainly was not the intention of Congress that the Estate Tax itself should be added to the taxable legacies for the purpose of assessing thereon an additional Estate Tax to be charged against and paid out of the charitable legacies which it intended to exempt wholly from taxation.

Judge Hough says in his opinion (p. 35):

> "Again, observing the language of the statute, it may be admitted that net estate is used but as a measure for tax, and is not itself taxed, for the impost is said to fall upon the entire property. This is a mere matter of words; for practical purposes the net estate is the taxable estate.
>
> It is therefore a fundamental injection, not only as to the spirit but as to the letter of this act, that the taxable estate is augmented by a deliberate and designed encroachment upon charities.

> It is the intent of the statute that charitable bequests shall not be taxed. By its regulation of the incidence of the tax, New York does in fact diminish in favor of the United States what the charities receives; but it must be wrong for the executive departments of the United States to use the rule of incidence, which is of State creation, to increase its own exactions."

If Mrs. Sage had left $35,000,000 in general legacies to charitable legatees and a residuary estate of $8,000,000 to non-charitable legatees, the $35,000,000 of general legacies would have been deducted without question and the tax computed upon the $8,000,000 residue and paid out of that residue, thus falling upon the beneficiaries who should properly bear the burden of the tax; but because Mrs. Sage left $8,000,000 in general legacies to non-charitable legatees and left a residuary estate of $35,000,000 to charitable legatees the Government insists that the tax the burden of which under the law of the State of New York falls not upon the taxable legatees but upon the exempt charities, should be increased by over $400,000, that amount representing the tax computed upon the amount of the tax itself. The Government argues that this unfortunate result arising from the method and manner in which it claims the tax must be computed is something for which the testatrix and not the law is responsible, a contention which is answered by Judge Hough in his opinion as follows (p. 34 of the Record):

> "It is next observable that this using of tax to measure tax will only happen when the residuary estate or some part of it is devoted to charity or other deductible purpose. If this testatrix had made her charitable bequests before inserting a residuary clause no difficulty would have arisen. It is argued with apparent seriousness that this is 'something for which the testatrix is responsible', which is true only

> if the law laid such a trap as this for charitable residuary legatees as distinguished from equally charitable general legatees—again something not lightly imputable to the lawgiver."

The words of Mr. Justice White in the famous case of Knowlton *vs.* Moore, 178 U. S. 41, directly apply to the case at bar.

The Statute then before the Court was the Federal Inheritance Tax of 1898. He pointed out that the confusion which gave rise to the various constructions of the Statute which were urged upon the Court resulted (178 U. S. 77)—

> "from not keeping in mind the distinction between the tax on the interest to which some person succeeds on a death and a tax on the interest which ceased by reason of the death; the two being different objects of taxation."

Then having decided the nature and theory of the tax imposed by the law then before the Court, he construed and interpreted all of its provisions in harmony with that single theory, and in announcing a simple, workable, just construction he said (178 U. S. p. 77):

> "We are therefore bound to give heed to the rule that where a particular construction of a statute will cause great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute."

It is confidently submitted that in the case at Bar the complicated theory and method adopted by the Government in the computation of the Estate Tax with their inherent inconsistency and violation of the general nature and theory of the tax, and resulting in the imposition of a heavy tax burden upon charity in utter

disregard and violation of the broad policy of the Statute must be discarded and repudiated in favor of the simple, reasonable and consistent theory and method adopted by the Executors in this case.

V.

The Federal Estate Tax is imposed upon the *transfer* of the decedent's property which is permitted, regulated and effected under the laws of the State of the decedent's domicile, the tax being measured by the value of the *net estate which is transferred* under the State law.

The transfer or devolution of the property of a decedent whether by will or intestacy is entirely within the jurisdiction of the various States.

In the leading case of Knowlton *vs.* Moore, 178 U. S. 41, at page 58, this Court has held:

> "Of course in considering the power of Congress to impose death duties we eliminate all thought of the greater privilege to do so than exists as to any other form of taxation as the right to regulate successions is vested in the States and not in Congress."

In the case of Wardell *vs.* Blum, in the Circuit Court of Appeals for the Ninth District, reported in 276 Fed. Rep. 226, affirmed 258 U. S. 617, the question there being the inclusion in the gross estate of a decedent for the purpose of the Estate Tax under the Revenue Act of 1916 of

the widow's interest in community property, the Court held:

> "(2) The Statute of the United States imposes an inheritance tax upon the transfer of the net estate of every decedent 'to the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate'. Sections 201-203, 39 Stat. 777.
>
> How is that interest to be determined?
>
> (3) Manifestly, we think, by the law of the State where the property is situated."

Under the law of New York the property which was transferred and passed under this decedent's Will to the charitable residuary legatees was the entire residue before deducting therefrom any Estate or Inheritance Taxes, whether Federal or State.

See Matter of Swift, 137 N. Y. 77, quoted above.

In the Matter of Hamlin, 185 App. Div. 153; affd. 226 N. Y. 407, Judge Kruse, writing the opinion in the Appellate Division, at page 155 says:

> "It (the Federal Estate Tax under the Act of 1916) is not a tax upon the property but upon the transfer thereof. The net value measures the tax. *The title passes from the decedent charged with the tax.*"

See also

> Matter of Ramsdill, 190 N. Y. 492;
> People *ex rel.* Andrews *vs.* Cameron, 140 App. Div. 76; affd. 200 N. Y. 584;
> People *ex rel.* Crook *vs.* Wells, 179 N. Y. 257.

Under the above decisions of the Court of Appeals it is the settled law of New York that the property of a

decedent which is transferred and passes to the residuary legatees is the full amount of the residue determined in the usual way recognized and followed by the State Courts by deducting from the gross estate the general and specific legacies and the debts and expenses of administration but wholly disregarding any Federal or State estate or inheritance taxes. The full amount of the residue thus ascertained is *the amount of the residuary bequest* which is transferred and passes under the Will. If the transferees are charities that full amount is the amount which must be deducted from the gross estate under the Exemption Clause of the Revenue Act of 1918.

VI.

If the property out of which the Federal Estate Tax was paid *was not transferred under the decedent's Will* it was not part of the net estate.

If the property out of which the Federal Estate Tax was paid *was transferred under the decedent's Will* it was necessarily part of the property which passed to the legatees charged with the payment of the tax, and in the present case was included in the amount of the charitable residuary bequests and was therefore deductible from the gross estate.

The nature of the Federal Estate Tax is settled beyond any question of doubt.

It is a privilege tax on *the transfer of the net estate* of a decedent and it is measured by the value of *the net estate transferred.*

In the present case the only property the value of which forms part of the gross estate or of the net estate for the purposes of the computation of the tax is that described in subdivision (*a*) of Section 202 as follows:

> "Sec. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property real or personal, tangible or intangible, wherever situated.
>
> (*a*) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate."
>
> (The other elements mentioned in subsequent clauses entering into the net estate as a measure of the tax are not material here.)

It is submitted that nowhere in the Revenue Act of 1916 can there be found any intimation of an intention on the part of Congress to impose the Estate Tax on the amount of the Estate Tax as such.

In the case of Gould *vs.* Gould, reported in 245 U. S. 151, the Court declared the general rule to be applied in the interpretation of the Revenue Act as follows:

> "In the interpretation of the statutes levying taxes it is the established rule not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government and in favor of the citizen."

Both the gross estate and the net estate must be constituted and build up only of property falling squarely within the words of the taxing statute, and no property can possibly form part of the net estate unless in the first instance it forms part of the gross estate.

Thus in the case of United States *vs.* Field, 255 U. S. 257, the Supreme Court held that property passing under a general power of appointment could not be included in the net estate of the donee of the power for the purposes of the Estate Tax because such property was not clearly and certainly covered by the words of the taxing act (Revenue Act of 1916).

The amount of the Federal Estate Tax as such certainly was not *transferred under the decedent's Will* to the United States Government.

If therefore the property actually used to pay the Federal Estate Tax was taken and appropriated by the Government at the instant of death and if it was not transferred and could not be transferred under decedent's will, as contended by the Government, it clearly was not part of the gross estate or of the net estate the transfer of which is taxed by the Act.

If on the other hand, as contended by the Executors, the property used to pay the Estate Tax was a part of the gross estate and was transferred under the decedent's will it must necessarily, have been a part of the residuary estate which passed in the first instance to the residuary legatees, charged however with the payment of the tax.

The property actually used to pay the Tax either was transferred or it was *not transferred.*

If it was not transferred it was not part of the gross estate nor of the net estate and therefore neither taxable nor the measure *pro tanto* of the tax.

If it was transferred it must have passed as part of the residuary estate to the charitable residuary legatees and therefore was not part of the net estate and neither taxable nor the measure *pro tanto* of the tax.

VII.

The Government by confessing error to the extent of the State Estate and Inheritance Taxes which were at first claimed to be deductible from the charitable residue, has in fact conceded its whole case.

The Executors here contend for the broad proposition that the Federal Estate Tax must be computed and assessed wholly without regard to the incidence of the tax itself or of any estate or inheritance taxes.

If however, as claimed by the Government, under the Estate Tax Title of the Revenue Act of 1916 no logical distinction can be drawn between a State Estate Tax and the Federal Estate Tax and both are paramount charges against the whole estate and ultimately payable out of the residue, then both are deductible from the gross estate.

The Government has conceded that the amount taken out of the charitable residue to pay State Estate Taxes should not be considered in determining the charitable residue to be deducted for purposes of the Federal Estate Tax, and yet the charities do not actually receive the moneys used to pay the State Estate Taxes any more than the moneys used to pay the Federal Estate Tax.

We submit that under the literal construction and meaning of the provisions of the Estate Tax Title of the Revenue Act of 1916, both State Estate Taxes and also the Federal Estate Tax itself are in every case allowable deductions from the gross estate. Such, however, was probably not the intention of Congress because it would

violate the fundamental rule of taxation for which the executors here contend, namely, that a tax is always computed and assessed without regard to the tax itself, but if that rule is to apply in one case, overriding the strict and literal construction of the express words of the statute, it must necessarily apply consistently in every case.

It might be a not unreasonable construction of the statute that it was intended to impose its own tax without regard to the incidence of that tax but having regard to the incidence of State Taxes, but the contention of the Government in this case, namely, that the Federal Estate Tax shall be computed and ascertained *with regard* to the incidence of that tax, but *without regard* to the incidence of State Estate Taxes is a legal absurdity.

VIII.

The judgment should be affirmed, with costs.

Respectfully submitted,

DeForest Brothers,
Attorneys for Respondents.

Robert Thorne,
of Counsel.

EDWARDS, FORMERLY COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF NEW YORK, *v.* SLOCUM ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 276. Argued January 10, 1924.—Decided February 18, 1924.

In assessing the "Estate Tax" under the "Revenue Act of 1918," 40 Stat. c. 18, Title IV, charitable bequests which are deductible from the gross estate in fixing the net taxable estate should be deducted without any diminution on account of the tax itself, even though, being residuary, they will ultimately bear the tax burden. P. 62. Cf. *Young Men's Christian Assn.* v. *Davis, ante,* 47.
287 Fed. 651, affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals affirming a judgment of the District Court for the plaintiffs in their action to recover from the Collector the amount of a tax paid under protest.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for petitioner.

Mr. Robert Thorne for respondents.

Mr. Harlan F. Stone and *Mr. Edward H. Green,* by leave of Court, filed a brief on behalf of the Executors of the Estate of Joseph R. DeLamar, as *amici curiae.*

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit brought by the respondents, executors of the will of Mrs. Sage, to recover the amount of a tax paid under protest. The tax was levied under the Act of February 24, 1919, c. 18, § 400; 40 Stat. 1057, 1096,

which imposes upon "the transfer of the net estate of every decedent dying after the passage of this Act" taxes equal to specified percentages of the net estate determined as provided in § 403. Mrs. Sage left an estate of $49,129,256.99. She bequeathed specified sums amounting to $1,285,000 for charitable purposes, $8,618,079.55 for purposes other than charitable, and the residue to charitable and educational institutions named. It is admitted that in estimating the tax now in question there is to be deducted from the gross estate the sum of $3,789,321.74 for debts and expenses and the charitable gifts of $1,285,000. These with the gifts to individuals above stated would leave a residue of $35,436,855.70, which the executors contend is exempt by the statute. Adding to the sums admitted to be exempt the residue thus arrived at and the statutory exemption of $50,000, the amount for which exemption is claimed will be $40,561,177.44, leaving a taxable remainder of $8,568,079.55. The Government required the payment of an additional sum reached by deducting from the exempted estate the amount of the tax to be paid, or in other words, adding the amount of the tax to the taxable estate. The suit is to recover this additional sum. The executors prevailed in the District Court and Circuit Court of Appeals after a discussion with which the Government well might have remained satisfied. 287 Fed. 651.

The Government's argument turns largely upon the consideration that a residue is only what is left after the payment of paramount claims. But this is not a tax upon a residue, it is a tax upon a transfer of his net estate by a decedent, a distinction marked by the words that we have quoted from the statute, and previously commented upon at length in *Knowlton* v. *Moore*, 178 U. S. 41, 49, 77. It comes into existence before and is independent of the receipt of the property by the legatee. It taxes, as Hanson, Death Duties, puts it in a passage

cited in 178 U. S. 49, "not the interest to which some person succeeds on a death, but the interest which ceased by reason of the death." It levies a sum equal to a certain percentage of the value of the net estate, and provides the criteria by which the net estate shall be ascertained. It thus manifestly assumes that the net estate will be ascertained before the tax is computed. The Government offers an algebraic formula by which it would solve the problems raised by two mutually dependent indeterminates. It fairly might be answered, as said by the Circuit Court of Appeals, that "algebraic formulae are not lightly to be imputed to legislators," but it appears to us that the structure of the statute is sufficient to exclude the imputation. As further remarked below, the theory departs from the long established practice of the law not to regard the incidence of a tax in the levying of a tax, and the position of the Government is contrary to the expressed intent of the statute to encourage charitable bequests. It is inconsistent with itself also in maintaining that while the distribution of the burden of taxation among the several beneficiaries is a matter of state regulation, the residue is not to be diminished by the state inheritance tax but only by the estate tax of the United States.

Judgment affirmed.

The CHIEF JUSTICE took no part in the decision of this case.